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Economic Affairs Interim Committee

64th Montana Legislature

as of 3/31/2016

Key Points for Connecting Licensing Board Study Dots ...

Prepared by Pat Murdo, Legislative Staff

At the heart of the Senate Bill 390 study of licensing board costs is a statute that in 1971 implemented a state reorganization plan attaching disparate boards to departments, 2-15-121, MCA, the administrative attachment statute. That statute, amended only once since enactment in 1971, has been the focus of one court case, Bowen v. Liberty Mutual Insurance Co., which reaffirmed the independence of the attached agency (1987).

A 2015 U.S. Supreme Court ruling may impact that statute. The ruling targets licensing boards as entities run by members of professions and possibly able to limit competition through government-sanctioned board action. Is there an impact expected on 2-15-121, MCA?

2-15-121, MCA

- **Lets agencies exercise policymaking functions independently and without approval or control by the department**
- **Assigns agencies to a department for administrative purposes only – including budget submission through the department and staffing, office designation**

The April 2016 meeting of the Economic Affairs Interim Committee will look at three aspects of licensing boards related to 2-15-121, MCA:

- impacts of the U.S. Supreme Court ruling in North Carolina Board of Dental Examiners v. Federal Trade Commission;
- alternate regulatory options as reflected by how Washington State handles licensing boards and regulatory boards; and
- the intersection of funding, public safety considerations, and independence in "running the show" within a governmental operating structure.

Antitrust Concerns and Liability Immunity after the U.S. Supreme Court Decision in NC Dental

Licensing boards typically are composed of governor-appointed members who are themselves licensees of the profession regulated by the board, with usually at least one member a nonlicensee who represents the public or consumer interest. One of the complaints often heard about licensing boards is that they use licensing to limit competition. Not surprisingly, antitrust complaints occasionally go beyond the local level to the Federal Trade Commission. In addition to the case in which the NC Dental Board tried to limit to dentists the ability to engage in teeth-whitening services, the FTC also issued consent orders in the last 10 years in response to the following complaints:

- a 2008 case in which the Missouri Board of Embalmers and Funeral Directors agreed not to limit sales of caskets to board-licensed funeral directors;
- a 2007 restraint of trade case that required the South Carolina State Board of Dentistry to publicly support a public health program that allowed dental hygienists to provide preventive dental care to

school children;

- a 2006 case under which the Austin (TX) Board of Realtors agreed not to prevent consumers with certain types of listing agreements from marketing on public real estate-related websites.

The NC Dental Board case[1] landed in the U.S. Supreme Court, which in a 6-3 decision mainly determined that the dental board was not protected as a state agency from an antitrust lawsuit under the state action immunity doctrine. The main reason given by Justice Anthony Kennedy, writing for the majority, was that "active market participants cannot be allowed to regulate their own markets free from antitrust accountability."

A summary of the case said, in part:

> Because a controlling number of the Board's decisionmakers are active market participants in the occupation the Board regulates, the Board can invoke state-action antitrust immunity only if it was subject to active supervision by the State, and here that requirement is not met. ...When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest.

The North Carolina Dental Board decision may have implications for Montana professional and occupational licensing boards, which are attached administratively, as provided in 2-15-121, MCA, to the Department of Labor and Industry. Along with outlining department duties, that statute says an attached entity is to "exercise its quasi-judicial, quasi-legislative, licensing, and policymaking functions independently of the department and without approval or control of the department."

No approval or control under 2-15-121, MCA

Under 2-15-121, MCA: "(1) An agency allocated to a department for administrative purposes only in this chapter shall (a) exercise its quasi-judicial, quasi-legislative, licensing, and policymaking functions independently of the department and without approval or control of the department."

The Federal Trade Commission, which filed the antitrust suit against the North Carolina Dental Board, has issued guidance[2] on active supervision for licensing boards, recognizing that many of these boards have de facto majorities of active market participants. The Table lists samples of boards composed of a majority of market participants.

Sample Boards and Range of Market Participants Plus Public Members

Board	# Members	Market Participants	Public Members
Alternative Healthcare	6	2 naturopaths, 2 midwives, 1 OB-GYN	1
Architects/Landscape Architects	6	2 architects, 1 architect professor, 2 landscape architects	1
Dentistry	10	5 dentists, 2 dental hygienists, 1 denturist	1

[1] See http://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf.

[2] See https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf

Medical Examiners	13	5 MDs, 1 osteopath, 1 podiatrist, 1 physician's assistant, 1 nutritionist, 1 acupuncturist, 1 volunteer EMT	2
Optometrists	4	3 optometrists	1
Pharmacists	7	4 pharmacists, 1 registered pharmacy technician	2

The guidance specifically says that federal antitrust law does not require active supervision and may, in fact, let antitrust law play out if active supervision is not provided. The guidance also notes that a determination of anticompetitive behavior is fact-specific and depends on context.

Among the points made in the FTC guidance are that, if a state regulatory board wants to have immunity under the state action defense, then two requirements must be met:

- the state legislature must clearly articulate a state policy that allows anticompetitive behavior, in line with the following description in the NC Dental decision: "a state legislature may impose restrictions on occupations, confer exclusive or share rights to dominate a market, or otherwise limit competition to achieve public objectives;" [p. 4].
- if the state policy is broadly general, then active supervision is necessary to prevent active market participants from using anticompetitive policies for personal benefits and not state goals.

The guidance provides examples of what may be considered anticompetitive behavior by a board and what likely is not. Investigation of fraudulent business practices of one electrician, for example, is not likely a problem nor is denial of a license based on failure to meet educational requirements set by rule or law. However, a pattern of disciplinary actions affecting multiple licensees--as could happen if morticians imposed additional rules not vetted by the legislature on crematory technicians--could impact competition.

For active supervision to pass muster with the FTC or the courts, the guidance says, the supervision must include a review of substance, not procedure, and be capable of modifying or vetoing whatever decision is not in line with state policy. A decision must be written. The supervision may be done by an administrator whose office oversees the regulatory board, the state attorney general, or another state official who is not an active market participant [p. 12].

Guidance provided on March 28, 2016, to Montana's licensing boards by Commissioner of Labor and Industry Pam Bucy summarized:

> Therefore, until such time as the Legislature chooses to enact more explicit provisions for active supervision, Department of Labor legal staff will continue to monitor board decisions and will continue to advise boards not to regulate or discipline licensees in a manner that unreasonably restrains trade. If a board chooses to regulate or discipline licensees in a manner that unreasonably restrains trade contrary to the express legal advice of Department attorneys, then the board members shall be advised that they risk losing their personal immunity from suit.[3]

[3]See March 28, 2016, Memo from Commissioner Bucy to Board members on the FTC Guidance:

Alternate Regulatory Options

Licensing boards are common among states. A 2016 report[4] compiled by the U.S. Department of Treasury, the Council of Economic Advisers, and the U.S. Department of Labor noted that an estimated 1,100 professions are regulated in at least one state, but fewer than 60 are regulated in all 50 states.

How states regulate varies. Some states use boards or committees as advisory groups only. Others let the boards or committees have policy control, with administrative details either handled by a department (as is done in Montana) or by contract (as is done with some licensing boards in South Dakota and Wyoming). Washington State has a combination of the two approaches. Engineers and medical doctors are among those with regulatory licensing boards that not only license and adjudicate complaints but recommend policies through rules and regulations. Telephone solicitors, however, are simply licensed and do not have a board.

The field of accountants is one of those licensed in all 50 states. This report will include more information on that profession because of the pilot project established under HB 560 in the 2015 session that allows the board to handle its own budgetary requirements. One of the reasons given during testimony on behalf of HB 560 was to let licensed accountants have control of their own funds. One thought was that the Board of Public Accountants might find ways to decrease expenses so their fees would be more in line with those of other states. Montana's fees of $150 for annual renewal of an individual's certified public accountant license are among the highest in the nation. Fees vary widely from Hawaii's equivalent of $21 a year ($42 for a biennial renewal) to the $150 equivalent that Montana, Connecticut, and Arizona charge. See Appendix A for a comparison of Board of Public Accountants' licensing fees.

Reasons for variations in costs among the states (and among professions) are not readily available. Listed below are some possible explanations:

- ***Licensing frequency.*** Washington State charges $230 to license CPAs for three years. Montana's licensing boards generally charge either for one or two years to enable better budgeting within the biennial budget. The Board of Public Accountants would not fall under that routine now because its funding is statutorily appropriated and operated out of an enterprise fund, at least for the duration of the pilot project. Other states, however, also license for one or two years at much lower costs than Montana.
- ***Economies of scale.*** Montana has about 3,950 CPAs. Without knowing the numbers of CPAs in other states, a comparison nationally is difficult, but in terms of intrastate comparison, economies of scale generally apply when more licensees share the cost of a board. For example, the 19,000-plus nurses in Montana pay $100 every two years to renew licenses, while the nearly 600 respiratory therapists pay $75 to renew licenses every year.
- ***Board activities.*** One of the ways that the Board of Public Accountants hoped to save money but also provide better checks on compliance with continuing education was to hire a national organization to oversee examinations and the auditing of continuing education rather than to have Montana staff handle those activities. Other board activities that can drive up licensees' costs include decisions to send board members and staff to national association meetings. These meetings may be helpful in learning about hot topics in the profession, but they also might be in far-off resorts. Also a cost-driver may be the frequency in which a board engages in rulemaking or the complexity of the rulemaking. Some rulemaking must be done to adjust to national or state regulatory changes in the profession; other rulemaking is discretionary and when done in a way that pushes boundaries is sure to take more staff time to respond to comments filed by other licensees.

[4]See https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.

- ***Complaints and screening panels.*** The more complaints that a board has to hear, the more that costs are likely to increase not just from board members' time but also from attorney time spent on the complaints. Under SB 76 enacted in the 2015 session, the Department of Labor and Industry received leeway, subject to board approval, to handle routine administrative complaints, such as a licensee not being compliant with requirements for continuing education or initial licensure. In the next year or so, the department may be able to say whether this provision has helped to decrease costs to a board for screening panels. In some professions, the ability of the board to file complaints or the ability for a person to file an anonymous complaint has generated more activity for screening panels, which in turn generates costs. One person told the Economic Affairs Committee in the 2011-2012 interim that an abundance of anonymous complaints amounted to an attempt to kill the Board of Funeral Service through skyrocketing screening panel costs. In 2012 that board had 90 new complaints, compared with 34 the next year.

Funding, Public Safety, and Independence

Funding -- Funding for professional and occupational licensing boards primarily depends on fees charged to licensees. These fees are for licensing and renewal costs, administrative and program expenses, and board costs, including expenses for rulemaking and screening panels. For most boards, the payments go into a special revenue account. Special revenue accounts are included in House Bill 2 appropriations and are subject to HB 2's spending authority limits.

In the 2015 session, successful bills changed how two boards operate in terms of funding:

- the Board of Public Accountants under HB 560 gained the right to operate with an enterprise fund, which is defined in 17-2-102, MCA, as a type of proprietary fund used for operations "that are financed and operated in a manner similar to private business enterprises whenever the intent of the legislature is that costs (i.e. expenses, including depreciation) of providing goods or services to the general public on a continuing basis are to be financed or recovered primarily through user charges, or whenever the legislature has decided that periodic determination of revenue earned, expenses incurred, or net income is appropriate for capital maintenance, public policy, management control, accountability, or other purposes;..."

> Types of funds used for licensing boards might seem arcane, but the fund type is tied to state financing policies.

- the Board of Funeral Service obtained a new funding source, allowed by House Bill 223, which takes a portion of the cost paid for death certificates at either the county or the state level and diverts that amount to help fund the Board of Funeral Service. As amended during session, the bill gained sideboards so that licensees still had to pay fees rather than letting the money from sales of public records pay the full cost for the board. The board spends money on inspections of funeral homes, crematories, and cemeteries and on screening panels and adjudication panels for complaints either brought by the board or by consumers and sometimes by competitors.

> The Board of Funeral Service is the first licensing board to use funds from the sale of an official public document to help run its operations.

Both bills have termination dates, with the change in death certificate costs reverting to pre-2015 status after June 30, 2017, and the pilot program for the Board of Public Accountants ending on September 30, 2019. Both boards are likely to ask future legislatures to remove the termination dates if the funding changes are working for them.

Testimony promoting the enterprise approach for the Board of Public Accountants noted several issues. One was that the Governmental Accounting Standards Board (under GASB 34) suggests accounting boards ought to use enterprise funds. It is not clear how many states have adopted that approach or whether GASB 34 actually incorporates governmental entities as small as licensing boards.

State Entities Using Enterprise Funds

- Secretary of State, 2-15-405, MCA
- Liquor Control Division, 16-2-108, MCA
- Surplus Property, 18-5-203, MCA
- State Park Visitor Fees, 23-1-105, MCA
- State Lottery, 23-7-401, MCA
- Board of Public Accountants, 37-50-205, MCA
- Unemployment Insurance Fund, 39-51-401, MCA
- Montana Correctional Enterprises, 53-30-132, MCA (also State Prison Ranch)
- Motor Vehicle Electronic Commerce, 61-3-118, MCA (license/permits online)
- Airport Authorities, 67-11-222, MCA
- Board of Hail Insurance, 80-2-222, MCA
- Agricultural Loan Authority, 80-12-311, MCA
- Housing Authority, 90-6-104, 107, 133, MCA
- Facility Finance Authority, 90-7-202, MCA

Another proponent of HB 560 contended that the current system of funding licensing boards through HB 2 allowed for movement of appropriation authority (not funds) between boards. One result in mid-2014 was that boards or bureaus within the Business Standards Division, perhaps through no fault of their own, overspent their appropriation authority; the Division reallocated appropriation authority from other boards. As explained at one of the Economic Affairs Committee meetings in 2014, the Business Standards Division had been able in the past to move appropriation authority among its bureaus, including the Building Codes Bureau, which had an excess of unneeded appropriation authority during the housing bust of the Great Recession. As the economy picked up, however, the Building Codes Bureau needed its appropriation authority. Whether previous years' budgets were inappropriately lean and benefitted from the recession or whether there were attempts by the Legislature or the Governor's Office to keep the budget looking leaner by limiting appropriation authority is unknown. The solution to unexpected costs, however, may have come from the 2015 Legislature's agreeing to provide the Department with a contingency fund.

Board of Public Accountants' member Dan Vuckovich relayed the impact of the appropriation shuffle to the Senate Business, Labor, and Economic Affairs Committee in saying that his board was notified in April 2014 that the board's budget had to be cut by $40,000 and that the board could not have another meeting in that fiscal year because other boards had used the Board of Public Accountant's appropriation authority. So, even though the board had a positive cash balance, the board couldn't spend the money. As a result, the board could not meet until after July in the new fiscal year and also could not do compliance audits of members' continuing education or adopt new rules until the new fiscal year. Vuckovich noted that transparency is difficult in budgeting if 32 other boards' budgets impact what his board can do with its budget. He also commented that what the department may see as efficiencies in staffing may result in a board being shorted the staff time for special projects.

As summed up by one staff member for the Department of Labor and Industry, an enterprise fund would mean that licensing boards run as a business, would allow boards to keep on hand more money than the current limit of two times their annual appropriation, and would require fee increases if expenses were greater than revenues.

However, not everyone likes the idea of an enterprise fund-based approach for licensing boards, in part, because the boards are a regulatory not a business activity. The people in charge of a board may see as their chief responsibility cost containment on fees or they may see studies, surveys, pilot projects and other costly, staff-intensive activities as more important for their professional advancement. A board that has to defend a budget request before the department also gives the department the information necessary to defend the budget before the Legislature in contrast to an enterprise fund where the budget primarily reflects the board's activity and, if unchecked, may be used more to promote the profession than to handle restricted activities like licensing, oversight, and regulation.

Policy decisions include:

- should a regulatory board operate as an enterprise;
- is there a better way of budgeting that keeps appropriation authority separate for each board;
- is a lean-staffed department interfering with professional advancement; or
- are too many mid- and high-level employees creating higher costs with boards unable to control staffing?

Public Safety -- Licensing by the state provides consumers with a measure of confidence that the person from whom the consumer is obtaining services has been vetted, by a government agency, as someone qualified to perform the service for which the person is licensed and against whom no serious unprofessional conduct challenges are commonplace. Sometimes state laws specify that only a person licensed by a state board may be eligible to perform a state-sanctioned activity. These include:

- persons counseling offenders (limited to licensees such as physicians, psychologists, social workers, professional counselors, or advanced practice registered nurses with a speciality in psychiatry);
- persons allowed to be in charge of the disposition of a dead body or remove a body from the place of death, such as funeral directors licensed under Title 37, chapter 19;
- persons licensed as sanitarians or professional engineers who, through their employment with a local health department or board of health, enable local review of certain subdivisions; and
- licensed engineers or surveyors who have the authority to say whether a methodology for an easement is accurate to within 5 meters (77-2-102, MCA).

A policy issue is whether a licensee who performs a function for a public agency, such as subdivision review, ought to receive an offset of licensing fees from the general fund because the general public benefits from the person's license.

An argument was made during reviews of licensing boards requested under 2011 legislation in HB 525 that those licensees whose jobs enable certain public functions to proceed, such as sanitarians doing subdivision reviews, ought to have their licenses paid in part by the public. Similar arguments have been made by the Board of Livestock, which contends that the public safety components of testing at the Veterinary Diagnostic Laboratory are important to public health and safety and therefore ought to be paid, in part, by an appropriation of the general fund.

Independence -- In the 2013 Legislature, licensees of both the Board of Realty Regulation and the Board of Public Accountants sought to have more independence from the Business Standards Division.[5] Both groups of licensees wanted more independence in terms of budgeting but the real estate-related group additionally wanted to handle the board's own staffing, website design, and myriad other functions. The

[5] HB 363 revising the Board of Realty Regulation passed both houses but a veto override failed. HB 582 revising the Board of Public Accountants passed both houses but was vetoed by the Governor.

requests came at the end of a division reorganization -- in which some board members expressed a concern that they were losing familiar staff who had handled their licensing and board representation. The department had sought through the reorganization to cross-train personnel, coordinate licensing by groups of people who did licensing, and standardize for all boards the concept of an executive officer, among other changes. Previously only those boards specifically identified in statute had an executive officer. Now all boards shared staff in a variety of ways. By the 2015 legislative session the Board of Realty Regulation licensees were not pushing for the previous legislation, but budgeting issues encouraged the accountants to push for a change in the way they operate.

Reasons vary when boards push for independence. From the licensees' perspective, they see a board funded by their own money and little opportunity to weigh in on costs related to big projects like system software, building remodeling, or reorganizations. Some see their compatriots in other states operating with lower licensing fees, better websites (perhaps), and otherwise greener grass. Old-timers may remember when their licensing board was more independent, with fewer attorneys present at meetings and little interference (as they see it) from the department.

> Licensing by the state entails some type of oversight by the state, whether by a department or by a board of one's peers. Having an independent board suggests state-backed power with little accountability to the state.

The policy question, however, behind independence is to what extent does the state want to grant free rein to the state's licensing power and all that goes with that power in terms of sanctions for unprofessional conduct or limitations on who enters the occupation. As the national report indicated, more professions want the prestige bestowed by a license. But the state power to license usually has strings attached to provide for some accountability. Otherwise, professional associations could handle certifications and a state could be limited to registration, as Montana does with housing contractors.

Summary

Being independent in light of the North Carolina Dental Board case is likely to mean free to be sued for restraint of trade, without active supervision. The Economic Affairs Interim Committee has the opportunity through the SB 390 Study to determine whether some type of legislative action is necessary to allow more overt control by the Department of Labor and Industry, perhaps based on other states' approaches to handling licensing boards. Although the SB 390 Study focuses on costs and how those charges benefit licensing boards, the policy questions raised in this background report connect the dots between what boards are willing to pay to get state authority and what type of accountability the boards are willing to give the public in exchange for that authority.

Appendix A

Comparison of licensing fees for Boards of Public Accountants across states

Access to state licensing boards via: https://www.thiswaytocpa.com/exam-licensure/state-requirements/

Alabama	$75 for active	Montana	$150 annual license renewal
Alaska	$300 application $390 certificate fee	Nebraska	$175 biennial license renewal
Arizona	$300 biennial license renewal	Nevada	$140 annual license renewal ($20 off if renew online by credit card)
Arkansas	CPA/PA application fee - $50 Annual registration - $110	New Hampshire	$275 for 3-year license renewal
California	$50 biennial license renewal	New Jersey	$90 for 3-year registration
Colorado	$74 biennial license renewal	New Mexico	$130 annual license renewal
Connecticut	Initial CPA certificate and license - $300 Professional Service Fee - $565. Annual renewal is $150.	New York	
Delaware	CPA Permit - $131. Renewal fee - by notification	North Carolina	$60 annual license renewal
Florida	$105 biennial license renewal	North Dakota	Not more than $100 annual renewal fee
Georgia	$100 biennial license renewal for an individual	Ohio	$150 - 3-year permit fee $55 - 3-year registration fee
Hawaii	$42 biennial license renewal (may be additional fees)	Oklahoma	$50 annual registration fee to renew individual license $100 to renew a permit
Idaho	$120 annual license renewal	Oregon	$255 biennial license renewal
Illinois	$40 annual license renewal	Pennsylvania	$100 biennial license renewal
Indiana	$105 - 3-year license renewal	Rhode Island	$375 3-year renewal permit
Iowa	$100 - annual registration and renewal	South Carolina	
Kansas	$150 biennial license renewal	South Dakota	$50 annual license renewal
Kentucky	$100 biennial license renewal (statute says not more than $200 biennially)	Tennessee	
Louisiana	$100 renewal of certificate	Texas	
Maine	$55 annual renewal	Utah	$63 annual license renewal

Maryland	$56 biennial license renewal	Vermont	
Massachusetts	$161 biennial license renewal	Virginia	
Michigan	$100 annual license fee	Washington	$230 for three-year renewal
Minnesota	$100 annual license renewal	West Virginia	
Mississippi	$110 annual license registration	Wisconsin	
Missouri	$80 biennial license renewal	Wyoming	$200 annual license renewal ($10 off for electronic filing)

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Montana Department of LABOR & INDUSTRY

Governor Steve Bullock
Commissioner Pam Bucy

Commissioner's Office

Date: March 28, 2016
To: Board Members of the Boards administratively attached to the Department of Labor and Industry
From: Pam Bucy, Commissioner of Labor and Industry
Re: Federal Trade Commission Guidance issued 10-14-15 regarding North Carolina State Board of Dental Examiners v. FTC, 135 S.Ct. 1101 (2015)

As many of you know, in February of 2015 the United States Supreme Court issued the North Carolina State Board of Dental Examiners v. Federal Trade Commission decision regarding the status of antitrust immunity for members of professional and occupational licensing boards. The Court ruled that boards made up of licensed members of a profession do not have immunity from personal liability for board decisions that restrict trade, unless the boards are subject to "active supervision." In October, the Federal Trade Commission (FTC) issued guidance regarding how it would interpret the requirement of "active supervision." The FTC is a federal regulatory agency that has authority over state licensing boards regarding anti-trust law, and its guidance sends a clear message. Simply stated, the FTC views the active supervision prong satisfied only if an entity that is not subject to the licensing and discipline power of a board has veto power over the decisions of a board that restrict competition. Active supervision is met when a governmental entity outside the authority of the board has the ability to weigh and determine whether board decisions are in the proper role of government.

The Supreme Court case recognizes the potential conflict of interest for a licensee in regulating a profession when that person has a vested interest in making a living through that profession. However, the case also explicitly recognizes that regulation is a proper police power of the state and antitrust immunity is established when active supervision is met. And importantly, the decision acknowledges the value of having licensed professionals conduct the regulation of a profession with their special expertise.

There are significant ways in which Montana's laws differ from North Carolina's, such that active supervision is in practical effect. Section 37-1-131, MCA, sets out the duties of boards. Pursuant to this section, Montana's boards are currently required to apply the standards and rules of a profession in a manner that does not restrain trade or competition unless necessary to protect public health and safety. Further, the Commissioner's legal staff advises the boards whenever board decisions are such that anti-trust immunity may be lost because a decision unreasonably restrains trade.

Although Montana's statutes are different than North Carolina's, the FTC guidance requires that explicit active supervision of boards is in place, to meet the North Carolina case requirements for immunity from suit. Therefore, until such time as the Legislature chooses to enact more explicit provisions for active supervision, Department of Labor legal staff will continue to monitor board decisions and will continue to advise boards not to regulate or discipline licensees in a manner that unreasonably restrains trade. If a board chooses to regulate or discipline licensees in a manner that unreasonably restrains trade

contrary to the express legal advice of Department attorneys, then the board members shall be advised that they risk losing their personal immunity from suit.

Attached to this letter is the North Carolina case and the FTC Guidance. Please direct questions to the legal staff for your respective boards.

FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants*

I. Introduction

States craft regulatory policy through a variety of actors, including state legislatures, courts, agencies, and regulatory boards. While most regulatory actions taken by state actors will not implicate antitrust concerns, some will. Notably, states have created a large number of regulatory boards with the authority to determine who may engage in an occupation (*e.g.*, by issuing or withholding a license), and also to set the rules and regulations governing that occupation. Licensing, once limited to a few learned professions such as doctors and lawyers, is now required for over 800 occupations including (in some states) locksmiths, beekeepers, auctioneers, interior designers, fortune tellers, tour guides, and shampooers.[1]

In general, a state may avoid all conflict with the federal antitrust laws by creating regulatory boards that serve only in an advisory capacity, or by staffing a regulatory board exclusively with persons who have no financial interest in the occupation that is being regulated. However, across the United States, "licensing boards are largely dominated by active members of their respective industries . . ."[2] That is, doctors commonly regulate doctors, beekeepers commonly regulate beekeepers, and tour guides commonly regulate tour guides.

Earlier this year, the U.S. Supreme Court upheld the Federal Trade Commission's determination that the North Carolina State Board of Dental Examiners ("NC Board") violated the federal antitrust laws by preventing non-dentists from providing teeth whitening services in competition with the state's licensed dentists. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015). NC Board is a state agency established under North Carolina law and charged with administering and enforcing a licensing system for dentists. A majority of the members of this state agency are themselves practicing dentists, and thus they have a private incentive to limit

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* This document sets out the views of the Staff of the Bureau of Competition. The Federal Trade Commission is not bound by this Staff guidance and reserves the right to rescind it at a later date. In addition, FTC Staff reserves the right to reconsider the views expressed herein, and to modify, rescind, or revoke this Staff guidance if such action would be in the public interest.

[1] Aaron Edlin & Rebecca Haw, *Cartels By Another Name: Should Licensed Occupations Face Antitrust Scrutiny*, 162 U. PA. L. REV. 1093, 1096 (2014).

[2] *Id.* at 1095.

competition from non-dentist providers of teeth whitening services. NC Board argued that, because it is a state agency, it is exempt from liability under the federal antitrust laws. That is, the NC Board sought to invoke what is commonly referred to as the "state action exemption" or the "state action defense." The Supreme Court rejected this contention and affirmed the FTC's finding of antitrust liability.

In this decision, the Supreme Court clarified the applicability of the antitrust state action defense to state regulatory boards controlled by market participants:

> "The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal's* [*Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)] active supervision requirement in order to invoke state-action antitrust immunity." *N.C. Dental*, 135 S. Ct. at 1114.

In the wake of this Supreme Court decision, state officials have requested advice from the Federal Trade Commission regarding antitrust compliance for state boards responsible for regulating occupations. This outline provides FTC Staff guidance on two questions. *First*, when does a state regulatory board require active supervision in order to invoke the state action defense? *Second*, what factors are relevant to determining whether the active supervision requirement is satisfied?

Our answers to these questions come with the following caveats.

- Vigorous competition among sellers in an open marketplace generally provides consumers with important benefits, including lower prices, higher quality services, greater access to services, and increased innovation. For this reason, a state legislature should empower a regulatory board to restrict competition only when necessary to protect against a credible risk of harm, such as health and safety risks to consumers. The Federal Trade Commission and its staff have frequently advocated that states avoid unneeded and burdensome regulation of service providers.[3]

- Federal antitrust law does not require that a state legislature provide for active supervision of any state regulatory board. A state legislature may, and generally should, prefer that a regulatory board be subject to the requirements of the federal antitrust

[3] *See, e.g.*, Fed. Trade Comm'n Staff Policy Paper, *Policy Perspectives: Competition and the Regulation of Advanced Practice Registered Nurses* (Mar. 2014), https://www.ftc.gov/system/files/documents/reports/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolicypaper.pdf; Fed. Trade Comm'n & U.S. Dept. of Justice, Comment before the South Carolina Supreme Court Concerning Proposed Guidelines for Residential and Commercial Real Estate Closings (Apr. 2008), https://www.ftc.gov/news-events/press-releases/2008/04/ftcdoj-submit-letter-supreme-court-south-carolina-proposed.

laws. If the state legislature determines that a regulatory board should be subject to antitrust oversight, then the state legislature need not provide for active supervision.

- Antitrust analysis – including the applicability of the state action defense – is fact-specific and context-dependent. The purpose of this document is to identify certain overarching legal principles governing when and how a state may provide active supervision for a regulatory board. We are not suggesting a mandatory or one-size-fits-all approach to active supervision. Instead, we urge each state regulatory board to consult with the Office of the Attorney General for its state for customized advice on how best to comply with the antitrust laws.

- This FTC Staff guidance addresses only the active supervision prong of the state action defense. In order successfully to invoke the state action defense, a state regulatory board controlled by market participants must also satisfy the clear articulation prong, as described briefly in Section II. below.

- This document contains guidance developed by the staff of the Federal Trade Commission. Deviation from this guidance does not necessarily mean that the state action defense is inapplicable, or that a violation of the antitrust laws has occurred.

II. Overview of the Antitrust State Action Defense

"Federal antitrust law is a central safeguard for the Nation's free market structures . . . . The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market." *N.C. Dental*, 135 S. Ct. at 1109.

Under principles of federalism, "the States possess a significant measure of sovereignty." *N.C. Dental*, 135 S. Ct. at 1110 (*quoting Community Communications Co. v. Boulder*, 455 U.S. 40, 53 (1982)). In enacting the antitrust laws, Congress did not intend to prevent the States from limiting competition in order to promote other goals that are valued by their citizens. Thus, the Supreme Court has concluded that the federal antitrust laws do not reach anticompetitive conduct engaged in by a State that is acting in its sovereign capacity. *Parker v. Brown*, 317 U.S. 341, 351-52 (1943). For example, a state legislature may "impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives." *N.C. Dental*, 135 S. Ct. at 1109.

Are the actions of a state regulatory board, like the actions of a state legislature, exempt from the application of the federal antitrust laws? In *North Carolina State Board of Dental Examiners*, the Supreme Court reaffirmed that a state regulatory board is not the sovereign. Accordingly, a state regulatory board is not necessarily exempt from federal antitrust liability.

More specifically, the Court determined that "a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates" may invoke the state action defense only when two requirements are satisfied: first, the challenged restraint must be clearly articulated and affirmatively expressed as state policy; and second, the policy must be actively supervised by a state official (or state agency) that is not a participant in the market that is being regulated. *N.C. Dental*, 135 S. Ct. at 1114.

- The Supreme Court addressed the clear articulation requirement most recently in *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013). The clear articulation requirement is satisfied "where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Id.* at 1013.

- The State's clear articulation of the intent to displace competition is not alone sufficient to trigger the state action exemption. The state legislature's clearly-articulated delegation of authority to a state regulatory board to displace competition may be "defined at so high a level of generality as to leave open critical questions about how

and to what extent the market should be regulated." There is then a danger that this delegated discretion will be used by active market participants to pursue private interests in restraining trade, in lieu of implementing the State's policy goals. *N.C. Dental*, 135 S. Ct. at 1112.

- The active supervision requirement "seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming [antitrust] immunity." *Id.*

Where the state action defense does not apply, the actions of a state regulatory board controlled by active market participants may be subject to antitrust scrutiny. Antitrust issues may arise where an unsupervised board takes actions that restrict market entry or restrain rivalry. The following are some scenarios that have raised antitrust concerns:

- A regulatory board controlled by dentists excludes non-dentists from competing with dentists in the provision of teeth whitening services. *Cf. N.C. Dental*, 135 S. Ct. 1101.

- A regulatory board controlled by accountants determines that only a small and fixed number of new licenses to practice the profession shall be issued by the state each year. *Cf. Hoover v. Ronwin*, 466 U.S. 558 (1984).

- A regulatory board controlled by attorneys adopts a regulation (or a code of ethics) that prohibits attorney advertising, or that deters attorneys from engaging in price competition. *Cf. Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

III. Scope of FTC Staff Guidance

A. This Staff guidance addresses the applicability of the state action defense under the federal antitrust laws. Concluding that the state action defense is inapplicable does not mean that the conduct of the regulatory board necessarily violates the federal antitrust laws. A regulatory board may assert defenses ordinarily available to an antitrust defendant.

1. **Reasonable restraints on competition do not violate the antitrust laws, even where the economic interests of a competitor have been injured.**

Example 1: A regulatory board may prohibit members of the occupation from engaging in fraudulent business practices without raising antitrust concerns. A regulatory board also may prohibit members of the occupation from engaging in untruthful or deceptive advertising. *Cf. Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

Example 2: Suppose a market with several hundred licensed electricians. If a regulatory board suspends the license of one electrician for substandard work, such action likely does not unreasonably harm competition. *Cf. Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696 (4th Cir. 1991) (en banc).

2. **The ministerial (non-discretionary) acts of a regulatory board engaged in good faith implementation of an anticompetitive statutory regime do not give rise to antitrust liability. See 324 Liquor Corp. v. Duffy, 479 U.S. 335, 344 n. 6 (1987).**

Example 3: A state statute requires that an applicant for a chauffeur's license submit to the regulatory board, among other things, a copy of the applicant's diploma and a certified check for $500. An applicant fails to submit the required materials. If for this reason the regulatory board declines to issue a chauffeur's license to the applicant, such action would not be considered an unreasonable restraint. In the circumstances described, the denial of a license is a ministerial or non-discretionary act of the regulatory board.

3. **In general, the initiation and prosecution of a lawsuit by a regulatory board does not give rise to antitrust liability unless it falls within the "sham exception." Professional Real Estate Investors v. Columbia Pictures Industries, 508 U.S. 49 (1993); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).**

Example 4: A state statute authorizes the state's dental board to maintain an action in state court to enjoin an unlicensed person from practicing dentistry. The members of the dental board have a basis to believe that a particular individual is practicing dentistry but does not hold a valid license. If the dental board files a lawsuit against that individual, such action would not constitute a violation of the federal antitrust laws.

B. Below, FTC Staff describes when active supervision of a state regulatory board is required in order successfully to invoke the state action defense, and what factors are relevant to determining whether the active supervision requirement has been satisfied.

1. When is active state supervision of a state regulatory board required in order to invoke the state action defense?

General Standard: "[A] state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity." *N.C. Dental*, 135 S. Ct. at 1114.

Active Market Participants: A member of a state regulatory board will be considered to be an active market participant in the occupation the board regulates if such person (i) is licensed by the board or (ii) provides any service that is subject to the regulatory authority of the board.

- If a board member participates in any professional or occupational sub-specialty that is regulated by the board, then that board member is an active market participant for purposes of evaluating the active supervision requirement.

- It is no defense to antitrust scrutiny, therefore, that the board members themselves are not directly or personally affected by the challenged restraint. For example, even if the members of the NC Dental Board were orthodontists who do not perform teeth whitening services (as a matter of law or fact or tradition), their control of the dental board would nevertheless trigger the requirement for active state supervision. This is because these orthodontists are licensed by, and their services regulated by, the NC Dental Board.

- A person who temporarily suspends her active participation in an occupation for the purpose of serving on a state board that regulates her former (and intended future) occupation will be considered to be an active market participant.

Method of Selection: The method by which a person is selected to serve on a state regulatory board is not determinative of whether that person is an active market participant in the occupation that the board regulates. For example, a licensed dentist is deemed to be an active market participant regardless of whether the dentist (i) is appointed to the state dental board by the governor or (ii) is elected to the state dental board by the state's licensed dentists.

A Controlling Number, Not Necessarily a Majority, of Actual Decisionmakers:

- Active market participants need not constitute a numerical majority of the members of a state regulatory board in order to trigger the requirement of active supervision. A decision that is controlled, either as a matter of law, procedure, or fact, by active participants in the regulated market (*e.g.*, through veto power, tradition, or practice) must be actively supervised to be eligible for the state action defense.

- Whether a particular restraint has been imposed by a "controlling number of decisionmakers [who] are active market participants" is a fact-bound inquiry that must be made on a case-by-case basis. FTC Staff will evaluate a number of factors, including:

  - ✓ The structure of the regulatory board (including the number of board members who are/are not active market participants) and the rules governing the exercise of the board's authority.

  - ✓ Whether the board members who are active market participants have veto power over the board's regulatory decisions.

Example 5: The state board of electricians consists of four non-electrician members and three practicing electricians. Under state law, new regulations require the approval of five board members. Thus, no regulation may become effective without the assent of at least one electrician member of the board. In this scenario, the active market participants effectively have veto power over the board's regulatory authority. The active supervision requirement is therefore applicable.

  - ✓ The level of participation, engagement, and authority of the non-market participant members in the business of the board – generally and with regard to the particular restraint at issue.

  - ✓ Whether the participation, engagement, and authority of the non-market participant board members in the business of the board differs from that of board members who are active market participants – generally and with regard to the particular restraint at issue.

  - ✓ Whether the active market participants have in fact exercised, controlled, or usurped the decisionmaking power of the board.

Example 6: The state board of electricians consists of four non-electrician members and three practicing electricians. Under state law, new regulations require the approval of a majority of board members. When voting on proposed regulations, the non-electrician members routinely defer to the preferences of the electrician members. Minutes of

board meetings show that the non-electrician members generally are not informed or knowledgeable concerning board business – and that they were not well informed concerning the particular restraint at issue. In this scenario, FTC Staff may determine that the active market participants have exercised the decisionmaking power of the board, and that the active supervision requirement is applicable.

Example 7: The state board of electricians consists of four non-electrician members and three practicing electricians. Documents show that the electrician members frequently meet and discuss board business separately from the non-electrician members. On one such occasion, the electrician members arranged for the issuance by the board of written orders to six construction contractors, directing such individuals to cease and desist from providing certain services. The non-electrician members of the board were not aware of the issuance of these orders and did not approve the issuance of these orders. In this scenario, FTC Staff may determine that the active market participants have exercised the decisionmaking power of the board, and that the active supervision requirement is applicable.

2. What constitutes active supervision?

FTC Staff will be guided by the following principles:

- "[T]he purpose of the active supervision inquiry . . . is to determine whether the State has exercised sufficient independent judgment and control" such that the details of the regulatory scheme "have been established as a product of deliberate state intervention" and not simply by agreement among the members of the state board. "Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy." The State is not obliged to "[meet] some normative standard, such as efficiency, in its regulatory practices." *Ticor*, 504 U.S. at 634-35. "The question is not how well state regulation works but whether the anticompetitive scheme is the State's own." *Id.* at 635.

- It is necessary "to ensure the States accept political accountability for anticompetitive conduct they permit and control." *N.C. Dental*, 135 S. Ct. at 1111. *See also Ticor*, 504 U.S. at 636.

- "The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the 'mere potential for state supervision is not an adequate substitute for a decision by the State.' Further, the state supervisor may not itself be an active market participant." *N.C. Dental*, 135 S. Ct. at 1116–17 (citations omitted).

- The active supervision must precede implementation of the allegedly anticompetitive restraint.

- "[T]he inquiry regarding active supervision is flexible and context-dependent." "[T]he adequacy of supervision . . . will depend on all the circumstances of a case." *N.C. Dental*, 135 S. Ct. at 1116–17. Accordingly, FTC Staff will evaluate each case in light of its own facts, and will apply the applicable case law and the principles embodied in this guidance reasonably and flexibly.

3. What factors are relevant to determining whether the active supervision requirement has been satisfied?

FTC Staff will consider the presence or absence of the following factors in determining whether the active supervision prong of the state action defense is satisfied.

- The supervisor has obtained the information necessary for a proper evaluation of the action recommended by the regulatory board. As applicable, the supervisor has ascertained relevant facts, collected data, conducted public hearings, invited and received public comments, investigated market conditions, conducted studies, and reviewed documentary evidence.

  - ✓ The information-gathering obligations of the supervisor depend in part upon the scope of inquiry previously conducted by the regulatory board. For example, if the regulatory board has conducted a suitable public hearing and collected the relevant information and data, then it may be unnecessary for the supervisor to repeat these tasks. Instead, the supervisor may utilize the materials assembled by the regulatory board.

- The supervisor has evaluated the substantive merits of the recommended action and assessed whether the recommended action comports with the standards established by the state legislature.

- The supervisor has issued a written decision approving, modifying, or disapproving the recommended action, and explaining the reasons and rationale for such decision.

  - ✓ A written decision serves an evidentiary function, demonstrating that the supervisor has undertaken the required meaningful review of the merits of the state board's action.

  - ✓ A written decision is also a means by which the State accepts political accountability for the restraint being authorized.

Scenario 1: Example of satisfactory active supervision of a state board regulation designating teeth whitening as a service that may be provided only by a licensed dentist, where state policy is to protect the health and welfare of citizens and to promote competition.

- The state legislature designated an executive agency to review regulations recommended by the state regulatory board. Recommended regulations become effective only following the approval of the agency.

- The agency provided notice of (i) the recommended regulation and (ii) an opportunity to be heard, to dentists, to non-dentist providers of teeth whitening, to the public (in a newspaper of general circulation in the affected areas), and to other interested and affected persons, including persons that have previously identified themselves to the agency as interested in, or affected by, dentist scope of practice issues.

- The agency took the steps necessary for a proper evaluation of the recommended regulation. The agency:

  - ✓ Obtained the recommendation of the state regulatory board and supporting materials, including the identity of any interested parties and the full evidentiary record compiled by the regulatory board.

  - ✓ Solicited and accepted written submissions from sources other than the regulatory board.

  - ✓ Obtained published studies addressing (i) the health and safety risks relating to teeth whitening and (ii) the training, skill, knowledge, and equipment reasonably required in order to safely and responsibly provide teeth whitening services (if not contained in submission from the regulatory board).

  - ✓ Obtained information concerning the historic and current cost, price, and availability of teeth whitening services from dentists and non-dentists (if not contained in submission from the regulatory board). Such information was verified (or audited) by the Agency as appropriate.

  - ✓ Held public hearing(s) that included testimony from interested persons (including dentists and non-dentists). The public hearing provided the agency with an opportunity (i) to hear from and to question providers, affected customers, and experts and (ii) to supplement the evidentiary record compiled by the state board. (As noted above, if the state regulatory board has previously conducted a suitable public hearing, then it may be unnecessary for the supervising agency to repeat this procedure.)

- The agency assessed all of the information to determine whether the recommended regulation comports with the State's goal to protect the health and

welfare of citizens and to promote competition.

- The agency issued a written decision accepting, rejecting, or modifying the scope of practice regulation recommended by the state regulatory board, and explaining the rationale for the agency's action.

Scenario 2: Example of satisfactory active supervision of a state regulatory board administering a disciplinary process.

A common function of state regulatory boards is to administer a disciplinary process for members of a regulated occupation. For example, the state regulatory board may adjudicate whether a licensee has violated standards of ethics, competency, conduct, or performance established by the state legislature.

Suppose that, acting in its adjudicatory capacity, a regulatory board controlled by active market participants determines that a licensee has violated a lawful and valid standard of ethics, competency, conduct, or performance, and for this reason, the regulatory board proposes that the licensee's license to practice in the state be revoked or suspended. In order to invoke the state action defense, the regulatory board would need to show both clear articulation and active supervision.

- In this context, active supervision may be provided by the administrator who oversees the regulatory board (*e.g.*, the secretary of health), the state attorney general, or another state official who is not an active market participant. The active supervision requirement of the state action defense will be satisfied if the supervisor: (i) reviews the evidentiary record created by the regulatory board; (ii) supplements this evidentiary record if and as appropriate; (iii) undertakes a de novo review of the substantive merits of the proposed disciplinary action, assessing whether the proposed disciplinary action comports with the policies and standards established by the state legislature; and (iv) issues a written decision that approves, modifies, or disapproves the disciplinary action proposed by the regulatory board.

Note that a disciplinary action taken by a regulatory board affecting a single licensee will typically have only a de minimis effect on competition. A pattern or program of disciplinary actions by a regulatory board affecting multiple licensees may have a substantial effect on competition.

The following do <u>not</u> constitute active supervision of a state regulatory board that is controlled by active market participants:

- The entity responsible for supervising the regulatory board is itself controlled by active market participants in the occupation that the board regulates. *See N.C. Dental*, 135 S. Ct. at 1113-14.

- A state official monitors the actions of the regulatory board and participates in deliberations, but lacks the authority to disapprove anticompetitive acts that fail to accord with state policy. *See Patrick v. Burget*, 486 U.S. 94, 101 (1988).

- A state official (*e.g.*, the secretary of health) serves ex officio as a member of the regulatory board with full voting rights. However, this state official is one of several members of the regulatory board and lacks the authority to disapprove anticompetitive acts that fail to accord with state policy.

- The state attorney general or another state official provides advice to the regulatory board on an ongoing basis.

- An independent state agency is staffed, funded, and empowered by law to evaluate, and then to veto or modify, particular recommendations of the regulatory board. However, in practice such recommendations are subject to only cursory review by the independent state agency. The independent state agency perfunctorily approves the recommendations of the regulatory board. *See Ticor*, 504 U.S. at 638.

- An independent state agency reviews the actions of the regulatory board and approves all actions that comply with the procedural requirements of the state administrative procedure act, without undertaking a substantive review of the actions of the regulatory board. *See Patrick*, 486 U.S. at 104-05.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS *v.* FEDERAL TRADE COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13–534. Argued October 14, 2014—Decided February 25, 2015

North Carolina's Dental Practice Act (Act) provides that the North Carolina State Board of Dental Examiners (Board) is "the agency of the State for the regulation of the practice of dentistry." The Board's principal duty is to create, administer, and enforce a licensing system for dentists; and six of its eight members must be licensed, practicing dentists.

The Act does not specify that teeth whitening is "the practice of dentistry." Nonetheless, after dentists complained to the Board that nondentists were charging lower prices for such services than dentists did, the Board issued at least 47 official cease-and-desist letters to nondentist teeth whitening service providers and product manufacturers, often warning that the unlicensed practice of dentistry is a crime. This and other related Board actions led nondentists to cease offering teeth whitening services in North Carolina.

The Federal Trade Commission (FTC) filed an administrative complaint, alleging that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition under the Federal Trade Commission Act. An Administrative Law Judge (ALJ) denied the Board's motion to dismiss on the ground of state-action immunity. The FTC sustained that ruling, reasoning that even if the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board must be actively supervised by the State to claim immunity, which it was not. After a hearing on the merits, the ALJ determined that the Board had unreasonably restrained trade in violation of antitrust law. The FTC again sustained the ALJ, and the Fourth Circuit affirmed the FTC in

all respects.

Held: Because a controlling number of the Board's decisionmakers are active market participants in the occupation the Board regulates, the Board can invoke state-action antitrust immunity only if it was subject to active supervision by the State, and here that requirement is not met. Pp. 5–18.

(a) Federal antitrust law is a central safeguard for the Nation's free market structures. However, requiring States to conform to the mandates of the Sherman Act at the expense of other values a State may deem fundamental would impose an impermissible burden on the States' power to regulate. Therefore, beginning with *Parker* v. *Brown*, 317 U. S. 341, this Court interpreted the antitrust laws to confer immunity on the anticompetitive conduct of States acting in their sovereign capacity. Pp. 5–6.

(b) The Board's actions are not cloaked with *Parker* immunity. A nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if "'the challenged restraint . . . [is] clearly articulated and affirmatively expressed as state policy,' and . . . 'the policy . . . [is] actively supervised by the State.'" *FTC* v. *Phoebe Putney Health System, Inc.*, 568 U. S. ___, ___ (quoting *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 105). Here, the Board did not receive active supervision of its anticompetitive conduct. Pp. 6–17.

(1) An entity may not invoke *Parker* immunity unless its actions are an exercise of the State's sovereign power. See *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U. S. 365, 374. Thus, where a State delegates control over a market to a nonsovereign actor the Sherman Act confers immunity only if the State accepts political accountability for the anticompetitive conduct it permits and controls. Limits on state-action immunity are most essential when a State seeks to delegate its regulatory power to active market participants, for dual allegiances are not always apparent to an actor and prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. Accordingly, *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. *Midcal*'s two-part test provides a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for entities purporting to act under state authority might diverge from the State's considered definition of the public good and engage in private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this

harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity. Pp. 6–10.

(2) There are instances in which an actor can be excused from *Midcal*'s active supervision requirement. Municipalities, which are electorally accountable, have general regulatory powers, and have no private price-fixing agenda, are subject exclusively to the clear articulation requirement. See *Hallie* v. *Eau Claire*, 471 U. S. 34, 35. That *Hallie* excused municipalities from *Midcal*'s supervision rule for these reasons, however, all but confirms the rule's applicability to actors controlled by active market participants. Further, in light of *Omni*'s holding that an otherwise immune entity will not lose immunity based on ad hoc and *ex post* questioning of its motives for making particular decisions, 499 U. S., at 374, it is all the more necessary to ensure the conditions for granting immunity are met in the first place, see *FTC* v. *Ticor Title Ins. Co.*, 504 U. S. 621, 633, and *Phoebe Putney, supra*, at ___. The clear lesson of precedent is that *Midcal*'s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants. Pp. 10–12.

(3) The Board's argument that entities designated by the States as agencies are exempt from *Midcal*'s second requirement cannot be reconciled with the Court's repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade. State agencies controlled by active market participants pose the very risk of self-dealing *Midcal*'s supervision requirement was created to address. See *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 791. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. While *Hallie* stated "it is likely that active state supervision would also not be required" for agencies, 471 U. S., at 46, n. 10, the entity there was more like prototypical state agencies, not specialized boards dominated by active market participants. The latter are similar to private trade associations vested by States with regulatory authority, which must satisfy *Midcal*'s active supervision standard. 445 U. S., at 105–106. The similarities between agencies controlled by active market participants and such associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie*, *supra*, at 39. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. Thus,

the Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity. Pp. 12–14.

(4) The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. But this holding is not inconsistent with the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State. Further, this case does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. Of course, States may provide for the defense and indemnification of agency members in the event of litigation, and they can also ensure *Parker* immunity is available by adopting clear policies to displace competition and providing active supervision. Arguments against the wisdom of applying the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity must be rejected, see *Patrick* v. *Burget*, 486 U. S. 94, 105–106, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. Pp. 14–16.

(5) The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis. The Act delegates control over the practice of dentistry to the Board, but says nothing about teeth whitening. In acting to expel the dentists' competitors from the market, the Board relied on cease-and-desist letters threatening criminal liability, instead of other powers at its disposal that would have invoked oversight by a politically accountable official. Whether or not the Board exceeded its powers under North Carolina law, there is no evidence of any decision by the State to initiate or concur with the Board's actions against the nondentists. P. 17.

(c) Here, where there are no specific supervisory systems to be reviewed, it suffices to note that the inquiry regarding active supervision is flexible and context-dependent. The question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests." *Patrick*, 486 U. S., 100–101. The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, see *id.*, at 102–103; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the "mere potential for state

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supervision is not an adequate substitute for a decision by the State," *Ticor*, *supra*, at 638. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case. Pp. 17–18.

717 F. 3d 359, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 13–534

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, PETITIONER *v.* FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[February 25, 2015]

JUSTICE KENNEDY delivered the opinion of the Court.

This case arises from an antitrust challenge to the actions of a state regulatory board. A majority of the board's members are engaged in the active practice of the profession it regulates. The question is whether the board's actions are protected from Sherman Act regulation under the doctrine of state-action antitrust immunity, as defined and applied in this Court's decisions beginning with *Parker* v. *Brown*, 317 U. S. 341 (1943).

I

A

In its Dental Practice Act (Act), North Carolina has declared the practice of dentistry to be a matter of public concern requiring regulation. N. C. Gen. Stat. Ann. §90–22(a) (2013). Under the Act, the North Carolina State Board of Dental Examiners (Board) is "the agency of the State for the regulation of the practice of dentistry." §90–22(b).

The Board's principal duty is to create, administer, and enforce a licensing system for dentists. See §§90–29 to

90–41. To perform that function it has broad authority over licensees. See §90–41. The Board's authority with respect to unlicensed persons, however, is more restricted: like "any resident citizen," the Board may file suit to "perpetually enjoin any person from . . . unlawfully practicing dentistry." §90–40.1.

The Act provides that six of the Board's eight members must be licensed dentists engaged in the active practice of dentistry. §90–22. They are elected by other licensed dentists in North Carolina, who cast their ballots in elections conducted by the Board. *Ibid.* The seventh member must be a licensed and practicing dental hygienist, and he or she is elected by other licensed hygienists. *Ibid.* The final member is referred to by the Act as a "consumer" and is appointed by the Governor. *Ibid.* All members serve 3-year terms, and no person may serve more than two consecutive terms. *Ibid.* The Act does not create any mechanism for the removal of an elected member of the Board by a public official. See *ibid.*

Board members swear an oath of office, §138A–22(a), and the Board must comply with the State's Administrative Procedure Act, §150B–1 *et seq.*, Public Records Act, §132–1 *et seq.*, and open-meetings law, §143–318.9 *et seq.* The Board may promulgate rules and regulations governing the practice of dentistry within the State, provided those mandates are not inconsistent with the Act and are approved by the North Carolina Rules Review Commission, whose members are appointed by the state legislature. See §§90–48, 143B–30.1, 150B–21.9(a).

B

In the 1990's, dentists in North Carolina started whitening teeth. Many of those who did so, including 8 of the Board's 10 members during the period at issue in this case, earned substantial fees for that service. By 2003, nondentists arrived on the scene. They charged lower

prices for their services than the dentists did. Dentists soon began to complain to the Board about their new competitors. Few complaints warned of possible harm to consumers. Most expressed a principal concern with the low prices charged by nondentists.

Responding to these filings, the Board opened an investigation into nondentist teeth whitening. A dentist member was placed in charge of the inquiry. Neither the Board's hygienist member nor its consumer member participated in this undertaking. The Board's chief operations officer remarked that the Board was "going forth to do battle" with nondentists. App. to Pet. for Cert. 103a. The Board's concern did not result in a formal rule or regulation reviewable by the independent Rules Review Commission, even though the Act does not, by its terms, specify that teeth whitening is "the practice of dentistry."

Starting in 2006, the Board issued at least 47 cease-and-desist letters on its official letterhead to nondentist teeth whitening service providers and product manufacturers. Many of those letters directed the recipient to cease "all activity constituting the practice of dentistry"; warned that the unlicensed practice of dentistry is a crime; and strongly implied (or expressly stated) that teeth whitening constitutes "the practice of dentistry." App. 13, 15. In early 2007, the Board persuaded the North Carolina Board of Cosmetic Art Examiners to warn cosmetologists against providing teeth whitening services. Later that year, the Board sent letters to mall operators, stating that kiosk teeth whiteners were violating the Dental Practice Act and advising that the malls consider expelling violators from their premises.

These actions had the intended result. Nondentists ceased offering teeth whitening services in North Carolina.

C

In 2010, the Federal Trade Commission (FTC) filed an

administrative complaint charging the Board with violating §5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. §45. The FTC alleged that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition. The Board moved to dismiss, alleging state-action immunity. An Administrative Law Judge (ALJ) denied the motion. On appeal, the FTC sustained the ALJ's ruling. It reasoned that, even assuming the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board is a "public/private hybrid" that must be actively supervised by the State to claim immunity. App. to Pet. for Cert. 49a. The FTC further concluded the Board could not make that showing.

Following other proceedings not relevant here, the ALJ conducted a hearing on the merits and determined the Board had unreasonably restrained trade in violation of antitrust law. On appeal, the FTC again sustained the ALJ. The FTC rejected the Board's public safety justification, noting, *inter alia*, "a wealth of evidence . . . suggesting that non-dentist provided teeth whitening is a safe cosmetic procedure." *Id.*, at 123a.

The FTC ordered the Board to stop sending the cease-and-desist letters or other communications that stated nondentists may not offer teeth whitening services and products. It further ordered the Board to issue notices to all earlier recipients of the Board's cease-and-desist orders advising them of the Board's proper sphere of authority and saying, among other options, that the notice recipients had a right to seek declaratory rulings in state court.

On petition for review, the Court of Appeals for the Fourth Circuit affirmed the FTC in all respects. 717 F. 3d 359, 370 (2013). This Court granted certiorari. 571 U. S. ___ (2014).

II

Federal antitrust law is a central safeguard for the Nation's free market structures. In this regard it is "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610 (1972). The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market.

The Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §1 *et seq.*, serves to promote robust competition, which in turn empowers the States and provides their citizens with opportunities to pursue their own and the public's welfare. See *FTC* v. *Ticor Title Ins. Co.*, 504 U. S. 621, 632 (1992). The States, however, when acting in their respective realm, need not adhere in all contexts to a model of unfettered competition. While "the States regulate their economies in many ways not inconsistent with the antitrust laws," *id.*, at 635–636, in some spheres they impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives. If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate. See *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 133 (1978); see also Easterbrook, Antitrust and the Economics of Federalism, 26 J. Law & Econ. 23, 24 (1983).

For these reasons, the Court in *Parker* v. *Brown* interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. See 317 U. S., at 350–351. That ruling

recognized Congress' purpose to respect the federal balance and to "embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Community Communications Co.* v. *Boulder*, 455 U. S. 40, 53 (1982). Since 1943, the Court has reaffirmed the importance of *Parker*'s central holding. See, *e.g.*, *Ticor*, *supra*, at 632–637; *Hoover* v. *Ronwin*, 466 U. S. 558, 568 (1984); *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 394–400 (1978).

III

In this case the Board argues its members were invested by North Carolina with the power of the State and that, as a result, the Board's actions are cloaked with *Parker* immunity. This argument fails, however. A nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if it satisfies two requirements: "first that 'the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy,' and second that 'the policy . . . be actively supervised by the State.'" *FTC* v. *Phoebe Putney Health System, Inc.*, 568 U. S. ___, ___ (2013) (slip op., at 7) (quoting *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 105 (1980)). The parties have assumed that the clear articulation requirement is satisfied, and we do the same. While North Carolina prohibits the unauthorized practice of dentistry, however, its Act is silent on whether that broad prohibition covers teeth whitening. Here, the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners.

A

Although state-action immunity exists to avoid conflicts

between state sovereignty and the Nation's commitment to a policy of robust competition, *Parker* immunity is not unbounded. "[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state action immunity is disfavored, much as are repeals by implication.'" *Phoebe Putney*, *supra*, at ___ (slip op., at 7) (quoting *Ticor*, *supra*, at 636).

An entity may not invoke *Parker* immunity unless the actions in question are an exercise of the State's sovereign power. See *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U. S. 365, 374 (1991). State legislation and "decision[s] of a state supreme court, acting legislatively rather than judicially," will satisfy this standard, and "*ipso facto* are exempt from the operation of the antitrust laws" because they are an undoubted exercise of state sovereign authority. *Hoover*, *supra*, at 567–568.

But while the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a nonsovereign actor. See *Parker*, *supra*, at 351 ("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful"). For purposes of *Parker*, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself. See *Hoover*, *supra*, at 567–568. State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. See *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 791 (1975) ("The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members"). Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of

Parker's rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control. See *Ticor*, 504 U. S., at 636.

Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability. See *Midcal*, *supra*, at 106 ("The national policy in favor of competition cannot be thwarted by casting [a] gauzy cloak of state involvement over what is essentially a private price-fixing arrangement"). Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. See, *e.g.*, *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U. S. 492, 501 (1988); *Hoover*, *supra*, at 584 (Stevens, J., dissenting) ("The risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of . . . our antitrust jurisprudence"); see also Elhauge, The Scope of Antitrust Process, 104 Harv. L. Rev. 667, 672 (1991). So it follows that, under *Parker* and the Supremacy Clause, the States' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations to active market participants. See Garland, Antitrust and State Action: Economic Efficiency and the Political Process, 96 Yale L. J. 486, 500 (1986).

Parker immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own.

See *Goldfarb*, *supra*, at 790; see also 1A P. Areeda & H. Hovencamp, Antitrust Law ¶226, p. 180 (4th ed. 2013) (Areeda & Hovencamp). The question is not whether the challenged conduct is efficient, well-functioning, or wise. See *Ticor*, *supra*, at 634–635. Rather, it is "whether anticompetitive conduct engaged in by [nonsovereign actors] should be deemed state action and thus shielded from the antitrust laws." *Patrick* v. *Burget*, 486 U. S. 94, 100 (1988).

To answer this question, the Court applies the two-part test set forth in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, a case arising from California's delegation of price-fixing authority to wine merchants. Under *Midcal*, "[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct." *Ticor*, *supra*, at 631 (citing *Midcal*, *supra*, at 105).

Midcal's clear articulation requirement is satisfied "where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Phoebe Putney*, 568 U. S., at ___ (slip op., at 11). The active supervision requirement demands, *inter alia*, "that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick*, *supra*, U. S., at 101.

The two requirements set forth in *Midcal* provide a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for a policy may

satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated. See *Ticor*, *supra*, at 636–637. Entities purporting to act under state authority might diverge from the State's considered definition of the public good. The resulting asymmetry between a state policy and its implementation can invite private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity.

Midcal's supervision rule "stems from the recognition that '[w]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.'" *Patrick*, *supra*, at 100. Concern about the private incentives of active market participants animates *Midcal*'s supervision mandate, which demands "realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick*, *supra*, at 101.

B

In determining whether anticompetitive policies and conduct are indeed the action of a State in its sovereign capacity, there are instances in which an actor can be excused from *Midcal*'s active supervision requirement. In *Hallie* v. *Eau Claire*, 471 U. S. 34, 45 (1985), the Court held municipalities are subject exclusively to *Midcal*'s "'clear articulation'" requirement. That rule, the Court observed, is consistent with the objective of ensuring that the policy at issue be one enacted by the State itself. *Hallie* explained that "[w]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the

expense of more overriding state goals." 471 U. S., at 47. *Hallie* further observed that municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market. See *id.*, at 45, n. 9. Critically, the municipality in *Hallie* exercised a wide range of governmental powers across different economic spheres, substantially reducing the risk that it would pursue private interests while regulating any single field. See *ibid.* That *Hallie* excused municipalities from *Midcal*'s supervision rule for these reasons all but confirms the rule's applicability to actors controlled by active market participants, who ordinarily have none of the features justifying the narrow exception *Hallie* identified. See 471 U. S., at 45.

Following *Goldfarb*, *Midcal*, and *Hallie*, which clarified the conditions under which *Parker* immunity attaches to the conduct of a nonsovereign actor, the Court in *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U. S. 365, addressed whether an otherwise immune entity could lose immunity for conspiring with private parties. In *Omni*, an aspiring billboard merchant argued that the city of Columbia, South Carolina, had violated the Sherman Act—and forfeited its *Parker* immunity—by anticompetitively conspiring with an established local company in passing an ordinance restricting new billboard construction. 499 U. S., at 367–368. The Court disagreed, holding there is no "conspiracy exception" to *Parker*. *Omni, supra*, at 374.

Omni, like the cases before it, recognized the importance of drawing a line "relevant to the purposes of the Sherman Act and of *Parker*: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest." 499 U. S., at 378. In the context of a municipal actor which, as in *Hallie*, exercised substantial governmental powers, *Omni* rejected a conspiracy exception for "corruption" as vague and unworkable, since "virtually all regulation benefits some

segments of the society and harms others" and may in that sense be seen as "'corrupt.'" 499 U. S., at 377. *Omni* also rejected subjective tests for corruption that would force a "deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid." *Ibid.* Thus, whereas the cases preceding it addressed the preconditions of *Parker* immunity and engaged in an objective, *ex ante* inquiry into nonsovereign actors' structure and incentives, *Omni* made clear that recipients of immunity will not lose it on the basis of ad hoc and *ex post* questioning of their motives for making particular decisions.

Omni's holding makes it all the more necessary to ensure the conditions for granting immunity are met in the first place. The Court's two state-action immunity cases decided after *Omni* reinforce this point. In *Ticor* the Court affirmed that *Midcal*'s limits on delegation must ensure that "[a]ctual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law." 504 U. S., at 633. And in *Phoebe Putney* the Court observed that *Midcal*'s active supervision requirement, in particular, is an essential condition of state-action immunity when a nonsovereign actor has "an incentive to pursue [its] own self-interest under the guise of implementing state policies." 568 U. S., at ___ (slip op., at 8) (quoting *Hallie*, *supra*, at 46–47). The lesson is clear: *Midcal*'s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants.

C

The Board argues entities designated by the States as agencies are exempt from *Midcal*'s second requirement. That premise, however, cannot be reconciled with the Court's repeated conclusion that the need for supervision

turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade.

State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal*'s supervision requirement was created to address. See Areeda & Hovencamp ¶227, at 226. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. See *Patrick*, 486 U. S., at 100–101.

The Court applied this reasoning to a state agency in *Goldfarb*. There the Court denied immunity to a state agency (the Virginia State Bar) controlled by market participants (lawyers) because the agency had "joined in what is essentially a private anticompetitive activity" for "the benefit of its members." 421 U. S., at 791, 792. This emphasis on the Bar's private interests explains why *Goldfarb*, though it predates *Midcal*, considered the lack of supervision by the Virginia Supreme Court to be a principal reason for denying immunity. See 421 U. S., at 791; see also *Hoover*, 466 U. S., at 569 (emphasizing lack of active supervision in *Goldfarb*); *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 361–362 (1977) (granting the Arizona Bar state-action immunity partly because its "rules are subject to pointed re-examination by the policymaker").

While *Hallie* stated "it is likely that active state supervision would also not be required" for agencies, 471 U. S., at 46, n. 10, the entity there, as was later the case in *Omni*, was an electorally accountable municipality with general regulatory powers and no private price-fixing agenda. In that and other respects the municipality was more like prototypical state agencies, not specialized boards dominated by active market participants. In important regards, agencies controlled by market partici-

pants are more similar to private trade associations vested by States with regulatory authority than to the agencies *Hallie* considered. And as the Court observed three years after *Hallie*, "[t]here is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm." *Allied Tube*, 486 U. S., at 500. For that reason, those associations must satisfy *Midcal*'s active supervision standard. See *Midcal*, 445 U. S., at 105–106.

The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie, supra*, at 39 (rejecting "purely formalistic" analysis). *Parker* immunity does not derive from nomenclature alone. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. See Areeda & Hovencamp ¶227, at 226. The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity.

D

The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. If this were so—and, for reasons to be noted, it need not be so—there would be some cause for concern. The States have a sovereign interest in structuring their governments, see *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991), and may conclude there are substantial benefits to staffing their

agencies with experts in complex and technical subjects, see *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U. S. 48, 64 (1985). There is, moreover, a long tradition of citizens esteemed by their professional colleagues devoting time, energy, and talent to enhancing the dignity of their calling.

Adherence to the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State reaches back at least to the Hippocratic Oath. See generally S. Miles, The Hippocratic Oath and the Ethics of Medicine (2004). In the United States, there is a strong tradition of professional self-regulation, particularly with respect to the development of ethical rules. See generally R. Rotunda & J. Dzienkowski, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility (2014); R. Baker, Before Bioethics: A History of American Medical Ethics From the Colonial Period to the Bioethics Revolution (2013). Dentists are no exception. The American Dental Association, for example, in an exercise of "the privilege and obligation of self-government," has "call[ed] upon dentists to follow high ethical standards," including "honesty, compassion, kindness, integrity, fairness and charity." American Dental Association, Principles of Ethics and Code of Professional Conduct 3–4 (2012). State laws and institutions are sustained by this tradition when they draw upon the expertise and commitment of professionals.

Today's holding is not inconsistent with that idea. The Board argues, however, that the potential for money damages will discourage members of regulated occupations from participating in state government. Cf. *Filarsky* v. *Delia*, 566 U. S. ___, ___ (2012) (slip op., at 12) (warning in the context of civil rights suits that the "the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts"). But this case, which does not

present a claim for money damages, does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. See *Goldfarb*, 421 U. S., at 792, n. 22; see also Brief for Respondent 56. And, of course, the States may provide for the defense and indemnification of agency members in the event of litigation.

States, furthermore, can ensure *Parker* immunity is available to agencies by adopting clear policies to displace competition; and, if agencies controlled by active market participants interpret or enforce those policies, the States may provide active supervision. Precedent confirms this principle. The Court has rejected the argument that it would be unwise to apply the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity:

> "[Respondents] contend that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and actively in peer-review proceedings. This argument, however, essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch. To the extent that Congress has declined to exempt medical peer review from the reach of the antitrust laws, peer review is immune from antitrust scrutiny only if the State effectively has made this conduct its own." *Patrick*, 486 U. S. at 105–106 (footnote omitted).

The reasoning of *Patrick* v. *Burget* applies to this case with full force, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. See generally Edlin & Haw, Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny? 162 U. Pa. L. Rev. 1093 (2014).

E

The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis.

By statute, North Carolina delegates control over the practice of dentistry to the Board. The Act, however, says nothing about teeth whitening, a practice that did not exist when it was passed. After receiving complaints from other dentists about the nondentists' cheaper services, the Board's dentist members—some of whom offered whitening services—acted to expel the dentists' competitors from the market. In so doing the Board relied upon cease-and-desist letters threatening criminal liability, rather than any of the powers at its disposal that would invoke oversight by a politically accountable official. With no active supervision by the State, North Carolina officials may well have been unaware that the Board had decided teeth whitening constitutes "the practice of dentistry" and sought to prohibit those who competed against dentists from participating in the teeth whitening market. Whether or not the Board exceeded its powers under North Carolina law, cf. *Omni*, 499 U. S., at 371–372, there is no evidence here of any decision by the State to initiate or concur with the Board's actions against the nondentists.

IV

The Board does not claim that the State exercised active, or indeed any, supervision over its conduct regarding nondentist teeth whiteners; and, as a result, no specific supervisory systems can be reviewed here. It suffices to note that the inquiry regarding active supervision is flexible and context-dependent. Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's anticom-

petitive conduct "promotes state policy, rather than merely the party's individual interests." *Patrick, supra,* at 100–101; see also *Ticor*, 504 U. S., at 639–640.

The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it, see *Patrick*, 486 U. S., at 102–103; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the "mere potential for state supervision is not an adequate substitute for a decision by the State," *Ticor, supra,* at 638. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case.

* * *

The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked.

The judgment of the Court of Appeals for the Fourth Circuit is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 13–534

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, PETITIONER *v.* FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[February 25, 2015]

JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

The Court's decision in this case is based on a serious misunderstanding of the doctrine of state-action antitrust immunity that this Court recognized more than 60 years ago in *Parker* v. *Brown*, 317 U. S. 341 (1943). In *Parker*, the Court held that the Sherman Act does not prevent the States from continuing their age-old practice of enacting measures, such as licensing requirements, that are designed to protect the public health and welfare. *Id.*, at 352. The case now before us involves precisely this type of state regulation—North Carolina's laws governing the practice of dentistry, which are administered by the North Carolina Board of Dental Examiners (Board).

Today, however, the Court takes the unprecedented step of holding that *Parker* does not apply to the North Carolina Board because the Board is not structured in a way that merits a good-government seal of approval; that is, it is made up of practicing dentists who have a financial incentive to use the licensing laws to further the financial interests of the State's dentists. There is nothing new about the structure of the North Carolina Board. When the States first created medical and dental boards, well before the Sherman Act was enacted, they began to staff

them in this way.[1] Nor is there anything new about the suspicion that the North Carolina Board—in attempting to prevent persons other than dentists from performing teeth-whitening procedures—was serving the interests of dentists and not the public. Professional and occupational licensing requirements have often been used in such a way.[2] But that is not what *Parker* immunity is about. Indeed, the very state program involved in that case was unquestionably designed to benefit the regulated entities, California raisin growers.

The question before us is not whether such programs serve the public interest. The question, instead, is whether this case is controlled by *Parker*, and the answer to that question is clear. Under *Parker*, the Sherman Act (and the Federal Trade Commission Act, see *FTC* v. *Ticor Title Ins. Co.*, 504 U. S. 621, 635 (1992)) do not apply to state agencies; the North Carolina Board of Dental Examiners is a state agency; and that is the end of the matter. By straying from this simple path, the Court has not only distorted *Parker*; it has headed into a morass. Determining whether a state agency is structured in a way that militates against regulatory capture is no easy task, and there is reason to fear that today's decision will spawn confusion. The Court has veered off course, and therefore I cannot go along.

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[1] S. White, History of Oral and Dental Science in America 197–214 (1876) (detailing earliest American regulations of the practice of dentistry).

[2] See, *e.g.*, R. Shrylock, Medical Licensing in America 29 (1967) (Shrylock) (detailing the deterioration of licensing regimes in the mid-19th century, in part out of concerns about restraints on trade); Gellhorn, The Abuse of Occupational Licensing, 44 U. Chi. L. Rev. 6 (1976); Shepard, Licensing Restrictions and the Cost of Dental Care, 21 J. Law & Econ. 187 (1978).

I

In order to understand the nature of *Parker* state-action immunity, it is helpful to recall the constitutional landscape in 1890 when the Sherman Act was enacted. At that time, this Court and Congress had an understanding of the scope of federal and state power that is very different from our understanding today. The States were understood to possess the exclusive authority to regulate "their purely internal affairs." *Leisy* v. *Hardin*, 135 U. S. 100, 122 (1890). In exercising their police power in this area, the States had long enacted measures, such as price controls and licensing requirements, that had the effect of restraining trade.[3]

The Sherman Act was enacted pursuant to Congress' power to regulate interstate commerce, and in passing the Act, Congress wanted to exercise that power "to the utmost extent." *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 558 (1944). But in 1890, the understanding of the commerce power was far more limited than it is today. See, *e.g.*, *Kidd* v. *Pearson*, 128 U. S. 1, 17–18 (1888). As a result, the Act did not pose a threat to traditional state regulatory activity.

By 1943, when *Parker* was decided, however, the situation had changed dramatically. This Court had held that the commerce power permitted Congress to regulate even local activity if it "exerts a substantial economic effect on interstate commerce." *Wickard* v. *Filburn*, 317 U. S. 111, 125 (1942). This meant that Congress could regulate many of the matters that had once been thought to fall exclusively within the jurisdiction of the States. The new interpretation of the commerce power brought about an expansion of the reach of the Sherman Act. See *Hospital*

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[3]See Handler, The Current Attack on the *Parker* v. *Brown* State Action Doctrine, 76 Colum. L. Rev. 1, 4–6 (1976) (collecting cases).

Building Co. v. *Trustees of Rex Hospital*, 425 U. S. 738, 743, n. 2 (1976) ("[D]ecisions by this Court have permitted the reach of the Sherman Act to expand along with expanding notions of congressional power"). And the expanded reach of the Sherman Act raised an important question. The Sherman Act does not expressly exempt States from its scope. Does that mean that the Act applies to the States and that it potentially outlaws many traditional state regulatory measures? The Court confronted that question in *Parker*.

In *Parker*, a raisin producer challenged the California Agricultural Prorate Act, an agricultural price support program. The California Act authorized the creation of an Agricultural Prorate Advisory Commission (Commission) to establish marketing plans for certain agricultural commodities within the State. 317 U. S., at 346–347. Raisins were among the regulated commodities, and so the Commission established a marketing program that governed many aspects of raisin sales, including the quality and quantity of raisins sold, the timing of sales, and the price at which raisins were sold. *Id.*, at 347–348. The *Parker* Court assumed that this program would have violated "the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons," and the Court also assumed that Congress could have prohibited a State from creating a program like California's if it had chosen to do so. *Id.*, at 350. Nevertheless, the Court concluded that the California program did not violate the Sherman Act because the Act did not circumscribe state regulatory power. *Id.*, at 351.

The Court's holding in *Parker* was not based on either the language of the Sherman Act or anything in the legislative history affirmatively showing that the Act was not meant to apply to the States. Instead, the Court reasoned that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Con-

gress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U. S., at 351. For the Congress that enacted the Sherman Act in 1890, it would have been a truly radical and almost certainly futile step to attempt to prevent the States from exercising their traditional regulatory authority, and the *Parker* Court refused to assume that the Act was meant to have such an effect.

When the basis for the *Parker* state-action doctrine is understood, the Court's error in this case is plain. In 1890, the regulation of the practice of medicine and dentistry was regarded as falling squarely within the States' sovereign police power. By that time, many States had established medical and dental boards, often staffed by doctors or dentists,[4] and had given those boards the authority to confer and revoke licenses.[5] This was quintessential police power legislation, and although state laws were often challenged during that era under the doctrine of substantive due process, the licensing of medical professionals easily survived such assaults. Just one year before the enactment of the Sherman Act, in *Dent* v. *West Virginia*, 129 U. S. 114, 128 (1889), this Court rejected such a challenge to a state law requiring all physicians to obtain a certificate from the state board of health attesting to their qualifications. And in *Hawker* v. *New York*, 170 U. S. 189, 192 (1898), the Court reiterated that a law

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[4] Shrylock 54–55; D. Johnson and H. Chaudry, Medical Licensing and Discipline in America 23–24 (2012).

[5] In *Hawker* v. *New York*, 170 U. S. 189 (1898), the Court cited state laws authorizing such boards to refuse or revoke medical licenses. *Id.*, at 191–193, n. 1. See also *Douglas* v. *Noble*, 261 U. S. 165, 166 (1923) ("In 1893 the legislature of Washington provided that only licensed persons should practice dentistry" and "vested the authority to license in a board of examiners, consisting of five practicing dentists").

specifying the qualifications to practice medicine was clearly a proper exercise of the police power. Thus, the North Carolina statutes establishing and specifying the powers of the State Board of Dental Examiners represent precisely the kind of state regulation that the *Parker* exemption was meant to immunize.

II

As noted above, the only question in this case is whether the North Carolina Board of Dental Examiners is really a state agency, and the answer to that question is clearly yes.

- The North Carolina Legislature determined that the practice of dentistry "affect[s] the public health, safety and welfare" of North Carolina's citizens and that therefore the profession should be "subject to regulation and control in the public interest" in order to ensure "that only qualified persons be permitted to practice dentistry in the State." N. C. Gen. Stat. Ann. §90–22(a) (2013).
- To further that end, the legislature created the North Carolina State Board of Dental Examiners "as the agency of the State for the regulation of the practice of dentistry in th[e] State." §90–22(b).
- The legislature specified the membership of the Board. §90–22(c). It defined the "practice of dentistry," §90–29(b), and it set out standards for licensing practitioners, §90–30. The legislature also set out standards under which the Board can initiate disciplinary proceedings against licensees who engage in certain improper acts. §90–41(a).
- The legislature empowered the Board to "maintain an action in the name of the State of North Carolina to perpetually enjoin any person from . . . unlawfully practicing dentistry." §90–40.1(a). It authorized the Board to conduct investigations and to hire legal

counsel, and the legislature made any "notice or statement of charges against any licensee" a public record under state law. §§ 90–41(d)–(g).

- The legislature empowered the Board "to enact rules and regulations governing the practice of dentistry within the State," consistent with relevant statutes. §90–48. It has required that any such rules be included in the Board's annual report, which the Board must file with the North Carolina secretary of state, the state attorney general, and the legislature's Joint Regulatory Reform Committee. §93B–2. And if the Board fails to file the required report, state law demands that it be automatically suspended until it does so. *Ibid.*

As this regulatory regime demonstrates, North Carolina's Board of Dental Examiners is unmistakably a state agency created by the state legislature to serve a prescribed regulatory purpose and to do so using the State's power in cooperation with other arms of state government.

The Board is not a private or "nonsovereign" entity that the State of North Carolina has attempted to immunize from federal antitrust scrutiny. *Parker* made it clear that a State may not "'give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.'" *Ante,* at 7 (quoting *Parker*, 317 U. S., at 351). When the *Parker* Court disapproved of any such attempt, it cited *Northern Securities Co.* v. *United States*, 193 U. S. 197 (1904), to show what it had in mind. In that case, the Court held that a State's act of chartering a corporation did not shield the corporation's monopolizing activities from federal antitrust law. *Id.*, at 344–345. Nothing similar is involved here. North Carolina did not authorize a private entity to enter into an anticompetitive arrangement; rather, North Carolina *created a state agency* and gave that agency the power to regulate a particular subject affecting public health and

safety.

Nothing in *Parker* supports the type of inquiry that the Court now prescribes. The Court crafts a test under which state agencies that are "controlled by active market participants," *ante*, at 12, must demonstrate active state supervision in order to be immune from federal antitrust law. The Court thus treats these state agencies like private entities. But in *Parker*, the Court did not examine the structure of the California program to determine if it had been captured by private interests. If the Court had done so, the case would certainly have come out differently, because California conditioned its regulatory measures on the participation and approval of market actors in the relevant industry.

Establishing a prorate marketing plan under California's law first required the petition of at least 10 producers of the particular commodity. *Parker*, 317 U. S., at 346. If the Commission then agreed that a marketing plan was warranted, the Commission would "select a program committee *from among nominees chosen by the qualified producers.*" *Ibid.* (emphasis added). That committee would then formulate the proration marketing program, which the Commission could modify or approve. But even after Commission approval, the program became law (and then, automatically) only if it gained the approval of 65 percent of the relevant producers, representing at least 51 percent of the acreage of the regulated crop. *Id.*, at 347. This scheme gave decisive power to market participants. But despite these aspects of the California program, *Parker* held that California was acting as a "sovereign" when it "adopt[ed] and enforc[ed] the prorate program." *Id.*, at 352. This reasoning is irreconcilable with the Court's today.

III

The Court goes astray because it forgets the origin of the

Parker doctrine and is misdirected by subsequent cases that extended that doctrine (in certain circumstances) to private entities. The Court requires the North Carolina Board to satisfy the two-part test set out in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), but the party claiming *Parker* immunity in that case was not a state agency but a private trade association. Such an entity is entitled to *Parker* immunity, *Midcal* held, only if the anticompetitive conduct at issue was both "'clearly articulated'" and "'actively supervised by the State itself.'" 445 U. S., at 105. Those requirements are needed where a State authorizes private parties to engage in anticompetitive conduct. They serve to identify those situations in which conduct *by private parties* can be regarded as the conduct of a State. But when the conduct in question is the conduct of a state agency, no such inquiry is required.

This case falls into the latter category, and therefore *Midcal* is inapposite. The North Carolina Board is not a private trade association. It is a state agency, created and empowered by the State to regulate an industry affecting public health. It would not exist if the State had not created it. And for purposes of *Parker*, its membership is irrelevant; what matters is that it is part of the government of the sovereign State of North Carolina.

Our decision in *Hallie* v. *Eau Claire*, 471 U. S. 34 (1985), which involved Sherman Act claims against a municipality, not a State agency, is similarly inapplicable. In *Hallie*, the plaintiff argued that the two-pronged *Midcal* test should be applied, but the Court disagreed. The Court acknowledged that municipalities "are not themselves sovereign." 471 U. S., at 38. But recognizing that a municipality is "an arm of the State," *id.*, at 45, the Court held that a municipality should be required to satisfy only the first prong of the *Midcal* test (requiring a clearly articulated state policy), 471 U. S., at 46. That municipalities

are not sovereign was critical to our analysis in *Hallie*, and thus that decision has no application in a case, like this one, involving a state agency.

Here, however, the Court not only disregards the North Carolina Board's status as a full-fledged state agency; it treats the Board less favorably than a municipality. This is puzzling. States are sovereign, *Northern Ins. Co. of N. Y.* v. *Chatham County*, 547 U. S. 189, 193 (2006), and California's sovereignty provided the foundation for the decision in *Parker*, *supra*, at 352. Municipalities are not sovereign. *Jinks* v. *Richland County*, 538 U. S. 456, 466 (2003). And for this reason, federal law often treats municipalities differently from States. Compare *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 71 (1989) ("[N]either a State nor its officials acting it their official capacities are 'persons' under [42 U. S. C.] §1983"), with *Monell* v. *City Dept. of Social Servs., New York*, 436 U. S. 658, 694 (1978) (municipalities liable under §1983 where "execution of a government's policy or custom . . . inflicts the injury").

The Court recognizes that municipalities, although not sovereign, nevertheless benefit from a more lenient standard for state-action immunity than private entities. Yet under the Court's approach, the North Carolina Board of Dental Examiners, a full-fledged state agency, is treated like a private actor and must demonstrate that the State actively supervises its actions.

The Court's analysis seems to be predicated on an assessment of the varying degrees to which a municipality and a state agency like the North Carolina Board are likely to be captured by private interests. But until today, *Parker* immunity was never conditioned on the proper use of state regulatory authority. On the contrary, in *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U. S. 365 (1991), we refused to recognize an exception to *Parker* for cases in which it was shown that the defendants had

engaged in a conspiracy or corruption or had acted in a way that was not in the public interest. *Id.*, at 374. The Sherman Act, we said, is not an anticorruption or good-government statute. 499 U. S., at 398. We were unwilling in *Omni* to rewrite *Parker* in order to reach the allegedly abusive behavior of city officials. 499 U. S., at 374–379. But that is essentially what the Court has done here.

III

Not only is the Court's decision inconsistent with the underlying theory of *Parker*; it will create practical problems and is likely to have far-reaching effects on the States' regulation of professions. As previously noted, state medical and dental boards have been staffed by practitioners since they were first created, and there are obvious advantages to this approach. It is reasonable for States to decide that the individuals best able to regulate technical professions are practitioners with expertise in those very professions. Staffing the State Board of Dental Examiners with certified public accountants would certainly lessen the risk of actions that place the well-being of dentists over those of the public, but this would also compromise the State's interest in sensibly regulating a technical profession in which lay people have little expertise.

As a result of today's decision, States may find it necessary to change the composition of medical, dental, and other boards, but it is not clear what sort of changes are needed to satisfy the test that the Court now adopts. The Court faults the structure of the North Carolina Board because "active market participants" constitute "a controlling number of [the] decisionmakers," *ante,* at 14, but this test raises many questions.

What is a "controlling number"? Is it a majority? And if so, why does the Court eschew that term? Or does the Court mean to leave open the possibility that something less than a majority might suffice in particular circum-

stances? Suppose that active market participants constitute a voting bloc that is generally able to get its way? How about an obstructionist minority or an agency chair empowered to set the agenda or veto regulations?

Who is an "active market participant"? If Board members withdraw from practice during a short term of service but typically return to practice when their terms end, does that mean that they are not active market participants during their period of service?

What is the scope of the market in which a member may not participate while serving on the board? Must the market be relevant to the particular regulation being challenged or merely to the jurisdiction of the entire agency? Would the result in the present case be different if a majority of the Board members, though practicing dentists, did not provide teeth whitening services? What if they were orthodontists, periodontists, and the like? And how much participation makes a person "active" in the market?

The answers to these questions are not obvious, but the States must predict the answers in order to make informed choices about how to constitute their agencies.

I suppose that all this will be worked out by the lower courts and the Federal Trade Commission (FTC), but the Court's approach raises a more fundamental question, and that is why the Court's inquiry should stop with an examination of the structure of a state licensing board. When the Court asks whether market participants control the North Carolina Board, the Court in essence is asking whether this regulatory body has been captured by the entities that it is supposed to regulate. Regulatory capture can occur in many ways.[6] So why ask only whether

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[6] See, *e.g.*, R. Noll, Reforming Regulation 40–43, 46 (1971); J. Wilson, The Politics of Regulation 357–394 (1980). Indeed, it has even been

the members of a board are active market participants? The answer may be that determining when regulatory capture has occurred is no simple task. That answer provides a reason for relieving courts from the obligation to make such determinations at all. It does not explain why it is appropriate for the Court to adopt the rather crude test for capture that constitutes the holding of today's decision.

IV

The Court has created a new standard for distinguishing between private and state actors for purposes of federal antitrust immunity. This new standard is not true to the *Parker* doctrine; it diminishes our traditional respect for federalism and state sovereignty; and it will be difficult to apply. I therefore respectfully dissent.

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charged that the FTC, which brought this case, has been captured by entities over which it has jurisdiction. See E. Cox, "The Nader Report" on the Federal Trade Commission vii–xiv (1969); Posner, Federal Trade Commission, Chi. L. Rev. 47, 82–84 (1969).

Montana Legislative Services Division

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PO BOX 201706
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To: Pat Murdo
From: Julie Johnson
Re: Appropriating Enterprise Funds
Date: April 12, 2016

QUESTION PRESENTED AND BRIEF ANSWER

Recently, I was asked by the Legislative Fiscal Division whether monies in an enterprise fund need to be appropriated by the Legislature. More specifically, the question focused on whether the newly created enterprise fund for the Board of Public Accountants codified at section 37-50-209, MCA, needed to be appropriated under section 17-7-502, MCA.

Enterprise funds are a type of proprietary fund, and typically the Legislature does not appropriate proprietary funds. However, as discussed below, in the case where the enterprise funds are being used as part of a program that is not an enterprise function, I believe the enterprise funds need to be appropriated, either in House Bill 2 or under section 17-7-502, MCA.

LAW

Article VII, section 14, of the Montana Constitution provides that "[e]xcept for interest on the public debt, no money shall be paid out of the treasury unless upon an appropriation made by law and a warrant drawn by the proper officer in pursuance thereof" (emphasis added).

Section 17-8-101, MCA, further addresses the appropriation and disbursement of money from the state treasury. Subsections (2) and (8) discuss enterprise funds:

> (2) Subject to the provisions of subsection (8), money deposited in the enterprise fund type . . . may be paid out of the treasury:
> (a) by appropriation; or
> (b) under general laws, or contracts entered into in pursuance of law, permitting the disbursement if a subclass is established on the state financial system.
>
> (8) Enterprise and internal service funds must be appropriated if they are used as a part of a program that is not an enterprise or internal service function and that otherwise requires an appropriation. An enterprise fund that is required by law to transfer money to the general fund or to any other appropriated fund is subject to appropriation. The payment of funds into an internal service fund must be authorized by law.

(Emphasis added). The emphasized language provides that enterprise funds that are not used as part of a program that is an enterprise function requires an appropriation. One can reasonably infer then that enterprise funds that are used as part of a program that is an enterprise function may not require an appropriation.

As pointed out in the Legislative Fiscal Division publication entitled *State Finance*, examples of enterprise funds include the operation of the state liquor warehouse, the state lottery, and the prison ranch. Funds that are received from the operation of the prison ranch may be used to maintain the operations of the prison ranch, and they are not appropriated in HB 2 or under section 17-7-502, MCA.[1]

ANALYSIS

During the 2015 legislative session, the Legislature passed HB 560, which created an enterprise fund for the Board of Public Accountants. Section 1 of HB 560 has been codified at section 37-50-209, MCA, and provides as follows:

> **37-50-209. (Temporary) Enterprise fund.** (1) There is an enterprise fund, as described in 17-2-102, established for the use of the board. The money in the fund is statutorily appropriated as provided in 17-7-502.
>
> (2) All licensing fees, other money collected by the department on behalf of the board, and all interest or earnings on money deposited in the enterprise fund must be deposited in or credited to the fund.
>
> (3) Money in the enterprise fund must be invested by the board of investments pursuant to the provisions of the unified investment program for state funds.
>
> (4) The enterprise fund must retain a cash reserve balance of at least 15% of the average of the last 3 years of revenue as needed for operation of the board and measured on completion of the license renewal cycle.
>
> (5) The enterprise fund may not include money taken from the general fund.

In this case, according to section 37-50-209, MCA, the use of the enterprise funds is for investment in the Unified Investment Program (UIP) for state funds. I think it is unlikely that investing through the UIP would be considered as an enterprise function of the Board of Public Accountants. Therefore, the Legislature correctly appropriated the enterprise fund in section 37-50-209, MCA.

GENERAL CONCLUSION

In general, it is my preliminary conclusion that any board that establishes an enterprise fund would still need to receive an appropriation if the fund is used to pay for an activity that is not considered an enterprise function. Whether or not an activity is considered an enterprise function would need to be considered on a case-by-case basis.

Cl0106 6104jxqa.

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[1] In a case in which "profits" in the enterprise funds are transferred to the general fund, such as the liquor warehouse and the state lottery, the costs to run those programs must be appropriated as required under section 17-8-101(8), MCA.

Washington State

Department of Licensing

Licensing Boards

Lorin Doyle, Administrator
Regulatory Boards Section
Business & Professions Division

Washington State Department of Licensing

Today's Topics

Department of Licensing's board models: advisory and regulatory boards

- Overview
- Board authority
- Funding
- Staffing

Washington State Department of Licensing

Other licensing boards/commissions

Several state agencies either staff licensing boards or are stand-alone licensing entities, including:

- Board of Accountancy
- Department of Health
- Gambling Commission
- Office of the Insurance Commissioner
- Department of Licensing

Washington State Department of Licensing

Business & Professions Division Boards

Four advisory boards and commissions:

- Real Estate Commission
- Real Estate Appraisers Commission
- Home Inspector Board Cosmetology, Barbering, Esthetics, Manicuring, and Hair Design Advisory Board

Six regulatory boards:

- Washington Board for Architects
- Board of Registration for Professional Engineers & Land Surveyors
- Funeral & Cemetery Board
- Geologist Licensing Board
- Board of Licensure for Landscape Architects
- Collection Agency Board

Washington State Department of Licensing

Business & Professions Division Boards

Licensee counts for advisory boards and commissions:

- **Real Estate Commission** (4179 businesses; 32,484 individuals)
- **Real Estate Appraisers Commission** (144 businesses; 2886 individuals)
- **Home Inspector Board** (816 individuals)
- **Cosmetology, Barbering, Esthetics, Manicuring, and Hair Design Advisory Board** (13,227 businesses, 64, 253 individuals)

As of 7/1/2015

Washington State Department of Licensing

Business & Professions Division Boards

Licensee counts for regulatory boards:

- **Washington Board for Architects** (1026 businesses, 6277 individuals)
- **Board of Registration for Professional Engineers & Land Surveyors** (1657 businesses; 27,226 individuals)
- **Funeral & Cemetery Board** (478 businesses; 1275 individuals)
- **Geologist Licensing Board** (2263 individuals)
- **Board of Licensure for Landscape Architects** (814 individuals)
- **Collection Agency Board** (1208 businesses)

As of 7/1/2015

Washington State Department of Licensing

Board Appointments

Governor Appointed

Advisory

- Real Estate Commission

Regulatory

- Architect Board
- Collection Agency Board
- Engineers & Land Surveyors Board
- Funeral & Cemetery Board
- Landscape Architect Board

Director Appointed

Advisory

- Real Estate Appraisers Commission
- Home Inspector Board
- Cosmetology Board

Regulatory

- Geologist Licensing Board

Washington State Department of Licensing

Board Funding

Appropriated

- Architect Board
- Collection Agency Board*
- Cosmetology Board *
- Engineers & Land Surveyors Board
- Home Inspector Board *
- Real Estate Commission
- Real Estate Appraisers Commission

Non-Appropriated

- Geologist Licensing Board
- Funeral & Cemetery Board
- Landscape Architect Board

* Shared funding account: division level, fee-based

Washington State Department of Licensing

Advisory Board Authority

- Governor- or director-appointed
- Board advises on scope and standards of practice
- Rule-making authority is limited
- Disciplinary actions
  - Escalate through division staff for negotiated settlements
  - Hearings proceed to one of two separate courts depending on nature of evidence
  - Appeals go first to the director then to Superior Court

Washington State Department of Licensing

Advisory Board Authority

Disciplinary actions, continued:

- Nature of the evidence determines process:
  - If it can be shown through paperwork ➔ Brief Adjudicative Proceeding (Dept. of Licensing)
  - If it requires testimony ➔ Office of Administrative Hearing (separate agency)
- Appeals go first to the agency director then to Superior Court

Washington State Department of Licensing

Regulatory Boards: General

- Governor- or director-appointed
- Board and department each have specific statutory authority
- Board sets requirements for
  - Entry into profession
  - Scope of practice
  - Standards of practice
- Disciplinary actions escalate through a single board member (case manager) to the full board

Washington State Department of Licensing

Regulatory Boards: Director Authority

(Funeral Directors) RCW 18.39.181 Powers and duties of director.

The director [of the Dept. of Licensing] shall have the following powers and duties:
(1) To issue all licenses provided for under this chapter;
(2) To renew licenses under this chapter;
(3) To collect all fees prescribed and required under this chapter;
(4) To immediately suspend the license of a person who has been certified pursuant to RCW 74.20A.320 by the department of social and health services as a person who is not in compliance with a support order;
(5) To keep records of all official acts, proceedings, and transactions of the department of licensing; and
(6) To employ the necessary staff to carry out the duties of this chapter.

(Geologist) RCW 18.220.040 Director's authority.

The director [of the Dept. of Licensing] has the following authority in administering this chapter:
(1) To adopt fees as provided in RCW 43.24.086; and
(2) To administer licensing examinations approved by the board.

Washington State Department of Licensing

Regulatory Boards: Board Authority

(Architect) RCW 18.08.340 Board—Rules—Executive director.

(1) The board may adopt such rules under chapter 34.05 RCW as are necessary for the proper performance of its duties under this chapter.

(2) The director shall employ an executive director subject to approval by the board.

(Engineer) RCW 18.43.035 Bylaws—Employees—Rules—Periodic reports and roster.

The board may adopt and amend bylaws establishing its organization and method of operation, including but not limited to meetings, maintenance of books and records, publication of reports, code of ethics, and rosters, and adoption and use of a seal. Four members of the board shall constitute a quorum for the conduct of any business of the board. The board may employ such persons as are necessary to carry out its duties under this chapter. It may adopt rules reasonably necessary to administer the provisions of this chapter. The board shall submit to the governor such periodic reports as may be required. A roster, showing the names and places of business of all registered professional engineers and land surveyors may be published for distribution, upon request, to professional engineers and land surveyors registered under this chapter and to the public.

Washington State Department of Licensing

Regulatory Boards: Board Authority

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Washington State Department of Licensing

Regulatory Board Authority

- Governor- or director-appointed
- Board has rule-making authority
- Board sets requirements for
  - Entry into profession
  - Scope of practice
  - Standards of practice
- Disciplinary actions escalate through a single board member (case manager) to the full board

Washington State Department of Licensing

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Washington State Department of Licensing

Regulatory Boards: Disciplinary Process

Regulatory Boards have full adjudicative authority.

Must keep a separation of function between

- Disciplinary case evaluation
- Disciplinary case adjudication

Washington State Department of Licensing

Regulatory Boards: Disciplinary Process

Disciplinary Case Manager: one board member who assists the staff and prosecutor

- Provides technical information about the profession to help guide investigations
- Evaluates evidence
- Determines sanctions
- Participates in settlement negotiations
- Testifies before the board during disciplinary hearings

Washington State Department of Licensing

Regulatory Boards: Disciplinary Process

Separation of function helps maintain the objectivity of the board members who sit in the adjudicative role for cases recommended for closure with no action and those that result in board orders

Washington State Department of Licensing

Attorney General Relationship

Advisory

- One assigned attorney from the Attorney Generals Office
- This attorney serves as both advisor to the board and prosecutor for the board
- Appellate process: agency director, then Superior Court
- AAG costs billed to program

Regulatory

- Two attorneys assigned from the Attorney Generals Office:
- Board advisor: attends meetings, advises the board in matters not tied to specific disciplinary action
- Board prosecutor: advises program staff and a board case manager on specific disciplinary cases; represents the board on appeals
- Appellate process: the board, then Superior Court
- AAG costs billed to program

Washington State Department of Licensing

Managing Boards - General

- Staffing
  - Functionalized vs. program-based
- Territory conflicts
  - Does it matter whose license? vs.
  - Only a licensed [fill in the profession] can do that.
- Role confusion
  - Regulatory vs. industry
- Impact of national issues

Washington State

Department of Licensing

Questions?

Lorin Doyle, Administrator
Regulatory Boards Section
Business & Professions Division

Montana Speech-Language-Hearing Association Proposals for Laws/Rules

(sent by email from Abigail St. Lawrence) April 2016

Simplification and ease of access to application process:

Propose:

1) **two year license renewal to align with reporting of 40 CEU (February 1 of each odd numbered year) instead of current one year renewal**
2) **separately list application fee (most states charge $75) (Rule 24.222.401)**
3) **prorate original license fee when halfway through license year**
4) **allow online application and online payment (at this time only renewal is paid** online)
5) **allow jurisprudence exam to be completed online**
6) **provide Jurisprudence exam information in one location online**

Board configuration:

Propose:

Terms must be staggered so that no more than three terms end each year. One audiologist and one speech pathologist are joining a board with an experienced member continuing. (MCA 2-15-1739)

Fee adjustments:

Propose:

1. **Addition of specific date to 37-15-307 specifying when Board must issue public report on website which determines yearly (two year) license change proposal.** (2008-2009 and 2010-2011 are currently the only Professional & Occupational Licensing Reports on website).

Current and projected budgets are not available on website

Fees collected for renewal were double previous year. There was no advance communication with licensees or a board meeting which could have provided an opportunity for questions. Since no minutes are available online I cannot see where the Board voted on this increase.

Balances are not to exceed two times the board's annual appropriation level and are to be adjusted (do we get a refund?) (37-1-101, #10)

2. **Board shall propose, as part of annual budget request, an adjustment in the amount of each fee that the board is authorized to collect.**
    a. **Based upon the appropriation made and subject to the approval of (executive director) the Board shall adjust its fees so that the revenue generated from the fees approximates its direct and indirect costs. Fees remain in effect for the fiscal year for which the budget applies.**
    b. **Whenever moneys are appropriate to a board or commission for its activities for the prior fiscal year unexpended, said moneys shall be made a part of the appropriation to such board for the next fiscal year, and such amount shall not be raised from fees collected by such board.**
    c. **Yearly state audit completed by (date shall be made available on website to support board recommended fees).**

April 4, 2016

Representative Ryan Lynch, Chair
Economic Affairs Interim Committee
Montana Legislative Services Division
P.O. Box 201706
Helena, Montana 59620-1706

RE: SB390 – Interim Study of Department of Labor and Industry Fees

Dear Chairman Lynch and Members of the Economic Affairs Interim Committee:

I previously provided a letter to your committee dated June 8, 2015. This letter serves as additional information after having reviewed documents and testimony provided to your committee. The additional information will provide the basis as to why I believe your committee should support some level of base funding for the Board of Sanitarians.

CONSIDERATIONS FOR PROVIDING BASE FUNDING FOR THE BOARD OF SANITARIANS:

1. **The Montana Legislature has determined it is in the public interest that sanitarians be licensed.**
   The Montana Legislature has determined that the sanitarian profession is to be licensed for public health and safety reasons. The legislature has placed the full cost of this professional licensing upon the licensees, with no general fund monies allocated to support this public protection. Just because a profession is small in number does not mean that the legislature's decision to require licensure is less valuable.

2. **Licensing of sanitarians is in the interest of public health and safety.** Registered sanitarians are part of the state's public health system. Licensing of this workforce is definitely in the interest of public health and safety as a means to provide both an educational and ethical standard. A more complete discussion of this topic was provided to the Montana Department of Labor and Industry (DLI) during board review under the 2013 Legislature's HB 525 – see attached response.

3. **The Department of Labor and Industry's method of determining and assigning charges for licensing boards is as fair and equitable as possible but has financial consequences for small boards.**
   The Department of Labor and Industry has provided testimony at your December 2015 meeting on why the current method to assign fees charged for board services, both direct and indirect, is the best possible method to fairly and equitably distribute the cost of professional licensing. I believe this is a reasonable effort to assure that fees are commensurate with services. However, as with any system, there are unforeseen and unintended consequences such as the high impact on small boards due to lack of economies of scale.

4. **Licensed Sanitarians cannot simply increase business activity or increase charges to cover increases in license fees.**
   Licensed Sanitarians work primarily for local government and have modest salaries. Licensing fees are either paid by the individual sanitarian or by their government employers. Unlike many professions, neither the sanitarian nor his/her employer has the ability to solicit additional business or increase charges for services in order to cover licensing fee increases.

5. **The Board of Sanitarians has done everything possible at this time to address its weak financial position and maintain its licensing under current Montana law.**
   The Board of Sanitarians, as a very small group of 185* licenses and annual revenues of $43,000, is struggling financially to maintain its professional licensing program. As a means to address its financial situation, the board has completed the following actions as advised by DLI staff:
   a. The Board increased its fees for 2016 from $170/year to $270/year. The Board was advised that this increase, the largest of the fee options presented by DLI staff to the Board, was projected to be adequate for a five-year period and would result in an ample reserve fund to provide for unanticipated expenses such as legal issues.
   b. At its December 2016 meeting, the Board voted to approve a policy as a means to allow DLI staff to process more license applications routinely without the Board meeting for this purpose. The goal of this policy is to both provide faster processing of applications and save the cost of additional Board meetings.

6. **The Board revised its rules in order to increase licensing fees resulting in higher indirect costs.**
   When the Board revised its rules in order to increase licensing fees, it paid for the direct cost of DLI attorney and staff time to facilitate the rule revision. This is understood and expected. However, such direct costs also increase the Board's percentage of indirect costs during a look-back period. While such increase in indirect costs is inconsequential for large boards, for small boards, such as the Board of Sanitarians, these charges have real negative impact in our financial projections.

7. **Rule changes to update professional standards create a financial burden for small boards.**
   All boards should be encouraged to periodically update their specific rules as a means to better protect public health and safety. Rule revisions are expensive, however, and are rarely undertaken without serious consideration of cost. Unfortunately, for small boards, not only are the direct costs of rule revisions high, but the resulting percentage of indirect costs adds to the cost burden of rule revision. Boards should have adequate financial support to keep their rules updated without overburdening the licensees.

8. **Legislative mandates have large impacts on small licensing groups such as the Board of Sanitarians.**
   In spite of substantially increasing licensing fees for 2016, the Board of Sanitarians learned at its December 2016 meeting that its financial report was not entirely optimistic. The Board was charged by DLI for expenses unanticipated in our fee increase calculation. These expenses were due to attorney fees necessary to respond to a legislative mandate to update the rules governing DLI professional licensing programs. These were "indirect costs" based upon the overall services he department provided to our board.

   Again, while the actual cost amounts discussed above are inconsequential to many boards, to the Board of Sanitarians, the amounts are substantial expenditures that adversely impact our financial goal of having an annual licensing fee that will bring the board into a positive financial condition that will last five years and provide a reserve.

9. **Addressing unprofessional conduct complaints is essential to the public protection provided by licensing. However, such complaints can create serious financial burdens for small boards.**
   A key purpose of licensing is to provide the public a means to address unprofessional practice. For small boards that have critical funding issues, such complaints can be financially crippling as they involved additional administrative and legal fees. While boards assess licensing fees that fund the

cost of some complaints, complex cases can create a real hardship for small boards. If the board cannot afford the cost of the complaint, state laws allow for the license holders to be charged additionally beyond the annual licensing fee to cover legal costs.

It is critical small boards be adequately funded such that they are fully prepared to address complaints from the public regarding its license holders.

10. **Combining of licensing groups or operation of licensing without a board does not provide for optimal public health and safety.**
The Department's report indicates that the economies of scale regarding licensing costs work well for large licensing groups to minimize costs. Taken to its logical conclusion, economies of scale would provide the greatest financial benefit if all 97,000 professional licenses were grouped together, charged one standard licensing fee, and oversighted by one entity.

However, such mega-structure does not serve the public health and safety of Montana. Specific professional licensing boards are the best means to manage the specific standards of each profession. This is true whether the board has 22,000+ licenses such as the Board of Nursing or whether the board is small such as the Board of Sanitarians with its 185 licenses. Only the individual board has the expertise to address the standards and performance of its licensees in an optimal way. Therefore, the option of combining of boards that are unrelated or licensing administration without a board only to improve a board's finances does not serve the public health and safety of Montana.

As stated in my earlier letter, I believe the sanitarian community is more than willing to pay a reasonable annual fee to maintain its licensing program. However, in comparison with the professionals we most closely associate with, our fees at $270.00 are very high. Nurses (22,000+ licenses) pay $100/2years; professional engineers and land surveyors (2,000+ licenses) pay $50.00/2 years. *(NOTE: license numbers reported in my previous letter were erroneous based upon errors contained within Board Summary tables available on the DLI website: FY12 & FY13 Professional & Occupational Licensing Report. Perhaps this is to what Director Bucy was referring in her comments at the June 2015 hearing when she mentioned "numerous inaccuracies" in my letter without further explanation.)*

As your committee concludes its work, I urge you to recommend to the 2017 Montana Legislative Session that base funding be made available to the Montana Board of Sanitarians in a formula and amount that will establish and maintain a licensing fee that is more comparable with our professional colleagues.

Thank you for your consideration of the above comments and for your work on this interim study.

Sincerely,

Susan K. Brueggeman, R.S.
Polson, Montana

*Licensing numbers and fees given in this letter were taken from the following document provided to your committee:
Fixed Costs and Indirect Costs Related to Licensing Boards' Fees
by Pat Murdo, Legislative Analyst

The Economic Affairs Committee asks that Board Representatives Answer the Following Questions during the Board Review under House Bill No. 525:

1. **What is the public health, safety or welfare rationale for licensing and regulating your profession/occupation?**

Registered Sanitarians (RS) are part of the public health system that includes registered public health nurses, epidemiologists, and others concerned with issues of public health significance. The profession of sanitarian is also known as Environmental Health Specialist. Environmental Health addresses the interaction between human health and the environment. Our health is affected by the quality of air, land, food and water resources. Maintaining and improving public health by managing those environmental factors that affect health is the goal of this professional group.

Examples of duties associated with the environmental health field include:

- On-site wastewater treatment system permitting, design and inspection
- Assuring wastewater system compliance with the Montana Water Quality Act
- State licensing and inspection of retail food establishments
- State licensing and inspection of wholesale food manufacturers
- State licensing and inspection of public accommodations
- State licensing and inspection of trailer parks, work camps, campgrounds, youth camps
- State licensing and inspection of pools, spas, and similar facilities
- Licensing and inspection of tattoo parlors
- Inspection of day care centers
- Inspection of group homes for the disabled
- Review of subdivisions under MCA 76-4 Sanitation in Subdivisions Act
  Includes review of water, wastewater, storm water, and solid waste management facilities
- Air quality program activities
- Solid waste compliance issues
- Public water system inspection under contract with MDEQ
- Education and training on all of the above
- Compliance and enforcement actions on all of the above

In Montana, those working in environmental health for a local government agency are required to be licensed by the Montana Department of Labor and Industry; state employees may require licensure if required by their position description.

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Phone (406) 841-2300
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2. **If your profession/occupation were not licensed, what public protection would be lost?**

The areas of environmental health listed above involve not only critical issues of public health but also business development and operation, the legal status of property development, and other private as well as community concerns. It is imperative that the registered sanitarian have an appropriate educational background, continuing educational, and ethical standards to competently address the science of public health, assure compliance with state and local regulations, provide education and training to promote environmental health, and interact with the public and business community in an effective and ethical way.

Without an educational and ethical standard, the administration of public health programs could result in inconsistencies in how public health laws are applied, lack of knowledge in how to protect the public's health based upon valid scientific evidence, application of state law in an unethical manner and without recourse available to the public, and a variety of other substandard practices.

The RS working for a local environmental health program is, essentially, where the state public health standards meet the public. It is critical for both current and future generations that the laws are applied accurately, fairly, and with an informed scientific basis.

3. **If a license is necessary (for health, safety, or welfare), does the profession/occupation need a board for oversight? If yes, please explain why and describe the purpose of creating a board.**

Board oversight is essential to the public. State regulations require that a registered sanitarian have a degree in Environmental Health from an accredited college or a degree that is equivalent as determined by the board. Because few applications come from those with an Environmental Health degree, the board routinely reviews applications for educational equivalency. The board also does the required application review to determine if the applicant has licensing or ethics issues in their past that might prevent them from serving the Montana public well as a Registered Sanitarian.

Because Registered Sanitarians routinely deal with applying public health law and standards, it is very important that the citizens of Montana have recourse to the board if they believe they have been treated unfairly or unethically by a sanitarian. While these requests are infrequent, this opportunity to have a hearing to address such a complaint is an essential part of the licensing system.

4. **Does your board deal with unlicensed practice issues? If yes, what types of issues?**

The board receives unlicensed practice complaints infrequently. Most of the duties that are included within a sanitarian's scope of practice are carried out by employees of local governments, and most governments are careful to hire qualified and licensed professionals. Many acts that might otherwise fall within the scope of practice as a sanitarian are covered by statutory exemptions that allow engineers, state and federal government public health officials, and individuals who are not employed by or under contract with government entities to perform sanitarian duties without being registered. Current law seems to adequately protect the public without unnecessary restrictions that hinder the work of individuals, businesses, and governments.

5. **People who are not licensed but are qualified in an occupation or profession may feel that a licensing board is preventing them from earning a living -- what is your response?**

   The only group required to be licensed are those practicing the profession of sanitarian in their employment with local government of those working for state government whose position descriptions require this licensing. There are many individuals working for private industry, state government, federal government, or self-employed who are qualified and work in areas related to the profession of the sanitarian. Examples are environmental consultants who evaluate land for development, prepare sanitation in subdivision applications, and design on-site wastewater systems. Some qualified persons serve as in-house inspectors for businesses and as trainers for the food industry. These individuals are valuable contributors to our communities; many choose to be professional licensed as a means to demonstrate their commitment to their profession, public/environmental health, and an ethical standard.

6. **How does your board monitor bias among board members toward a particular licensee, an applicant, or a respondent (to unlicensed practice)? How does your board monitor bias toward a particular profession/occupation, if more than one profession or occupation is licensed by the board?**

   This board which is composed of three Registered Sanitarians and two members of the public monitor one profession with the two license types of Registered Sanitarian and Sanitarian-in-Training. The structure of the board provides balance in the regulation of the industry. Board members are educated through training to identify and understand conflicts of interest. A member who feels they may have a conflict of interest associated with an application, license, or disciplinary issue can freely recuse themselves from voting.

7. **Does the profession or occupation have one or more associations that could provide oversight without the need for a licensing board? Why not use the association as the oversight body?**

   Registered Sanitarians are typically members of the Montana Environmental Health Association (MEHA) and/or the National Environmental Health Association (NEHA). MEHA is formed as an affiliate under NEHA. There is no requirement that either MEHA or NEHA exist, so it is possible that any oversight these associations might provide could cease. MEHA does not have, and I would be quite confident that they would not choose to have, any involvement with professional licensing or application of an ethical standard. NEHA has professional licensing: Environmental Health Specialist (EHS) which is comparable to the Montana RS license. One avenue to meeting the Environmental Health Degree equivalency standard of Montana is to have a NEHA EHS license and a Microbiology course. NEHA licensing has not been deemed a suitable replacement for Montana licensing in that it does not have an ethical standard associated with the Environmental Health Specialist certification. The educational standards also vary somewhat from Montana which is a topic currently being addressed by the board.

8. **Is a licensing board needed in order for the practitioner to bill to receive insurance (for example, health insurance)? If so, is there an alternate method for billing that may be recognized rather than having a license or being regulated by a licensing board?**

   No - This issue is not related to Sanitarian registration.

9. **What are the benefits of a board being part of the licensing and discipline process instead of the department handling one or both?**

   The board is composed of three Registered Sanitarians and two members of the public. Having members who are part of the profession is very important. This profession is rather unusual and not well-understood. There are only about 100+ sanitarians who work for local government. Therefore, having people who are invested in the profession serve on the board brings understanding regarding both educational and ethical standards that are appropriate for the profession. Having public member on the board is also important in that the purpose of professional licensing is to protect the public whom they represent. The board brings continuity to the process. The Department is valuable in its expertise, but the positions have turnover that can impede understanding. The Department is not an invested party to the registered sanitarian with regard to public relationship.

10. **Is there an optimum ratio between licensees, board size, or public representation?**

    A greater number of licensees allows for a reduced annual licensing fee. The Registered Sanitarian group is one of the smallest license groups; this means our operating costs bring higher fees than that of many professions. While this is not optimal, the sanitarians, when surveyed in 2011, expressed their support of maintaining its own licensing group and board. The ratio on the Board of Sanitarians seems appropriate with three RS and two members of the public. This brings a good balance between those licensed and those protected.

11. **If a board's purpose includes protecting public welfare, would that consumer protection be handled better by the Attorney General's office than by a board? (In other words, is there a value in a disinterested third party? If yes, why? If not, why not?) Who should be responsible for monitoring fraud within the profession or occupation?**

    It is of great benefit to have a board who understands the profession. This is especially true with a profession that has a small number of licensees and is often not well understood by the average person. The board structure allows the members to better understand the profession, its needs for educational requirements, judgment when ethical standards are compromised, and the other responsibilities seated with the board. Rarely, does this board address issues of consumer protection. As such, it is not likely the Attorney General's office could develop the relationships and the understanding necessary to determine if the public protection is being adequately served by this profession.

12. If boards have overlapping scopes of practice, should there be a third-party to determine whether there is intrusion into the other's practices? If so, who should be the judge? If not, why not? Should each be allowed to operate on the other's turf without repercussions?

The closest example relative to this question pertains to Registered Sanitarians and Professional Engineers. There has been some issue raised over the limits of the types of wastewater systems that can be designed by Registered Sanitarians vs engineers. While not part of these conversations, this matter was resolved by the two groups meeting to determine the appropriate line of jurisdiction for the professions. It was determined that a wastewater system with a design flow of 2500gpd or more was to be designed by an engineer. A collaborative attempt to reach consensus would be the best first step with a third party entering the conversation if deemed necessary.

13. Should any board have the ability to limit use of certain terminology to only a licensee?

In order to be protective of the public, there are times when terminology related to a professional should be limited to a licensed person. Boards should be able to limit the use of certain terminology so that the public is not mislead or confused by persons describing themselves in professional terms.

April 8, 2016

Attn: Ms. Patricia Murdo
Economic Affairs Interim Committee
Montana Legislative Services Division
P.O. Box 201706
Helena, MT 59620-1706

RE: **SB390 – Interim Study of Department of Labor & Industry Fees**

Dear Members:

I wish to provide input on your committee study of the current and projected fees charged by the Montana Department of Labor & Industry (MDOL). My comments will be specifically directed toward the Board of Sanitarians and their present licensing fees.

I have been licensed as a Sanitarian (Environmental Health Specialist) since 1991, and practicing the profession as a county/Board of Health employee of Gallatin County since 1992. Until MDOL was directed to become more fee supported our licensing fees were relatively modest.

I totally understand the rational presented by MDOL and the need for them to cover the work they do. But I ask that you consider ways of fee supporting our Board licensure in some fashion because of the following:

- By State law, sanitarians must be licensed to do our inspecting jobs.
- Our jobs – inspections of restaurants, pool & spas, etc. – are also mandated by State law. County governments cannot opt out of inspections (MT Attorney General Opinion – Vol. 46, Opinion 3).
- Gallatin County does not contribute to licensing fees: few, if any, counties do.
- Environmental Health Specialists have a modest salary compared to nurses or engineers who pay much, much, less Board licensing fees.
    - Example – physicians pay $500 every *two* years
    - Example – nurses pay $100 every *two* years
    - Example – engineers pay $50 every *two* years

In summary, Sanitarians I've talked to are desirous of Board oversight due to our required education and job responsibilities. Some smaller counties need a Board to provide recourse should a Sanitarian not act professionally. We are willing to pay a reasonable fee for that service – but our $270 per year fee is among the highest required and our ability to pay is not commensurate.

Thank you for your work in this difficult area and for allowing me to express my opinions.

Thomas Moore
Environmental Health Specialist – Gallatin County
215 W. Mendenhall, Rm 108
Bozeman, MT 59715

tom.moore@gallatin.mt.gov

April 13, 2016

Economic Affairs Interim Committee
Montana Legislative Services Division
P.O. Box 201706
Helena, Montana 59620

RE: SB 390

Mr. Chairman and Members of the Economic Affairs Interim Committee:

My name is Donald Saisbury and I am a working Registered Sanitarian for Flathead County. I am writing this letter to support the request for base funding from the general fund to help alleviate the high cost of licensure for Registered Sanitarians. Currently, as I am sure you are aware, a Registered Sanitarian is required to pay $270 per year to maintain their license. Compared to other professional licenses required by the State of Montana, this is very high.

I came to this realization earlier this year when I had to renew my license. I had previously worked as a Sanitarian in Lake County from January 2008 to July 2014. As I was unsure that I would ever work as a Sanitarian again, I did not renew my license when it became due in July of 2015. In the fall of 2015 a position opened in Flathead County that I would later accept. Because I had let my license lapse, I was informed that I would need to pay the $270 license fee, as well as the $270 late fee, in order to have my registration reinstated. I am fortunate to work for a county that can afford to pay for my registration, but I still had to find the money for the late fee. I realize much, if not all, of the $270 is a result of the low number of Sanitarians we have licensed in Montana. However, that shouldn't take away from the fact that such a high cost is burdensome.

The requirement to be licensed, I believe, is a sound one. I think it brings a level of professional consistency to Sanitarians across the state. Whether you are a Sanitarian working in private practice or you are working for a county government, the pre-requisites to attaining a Sanitarian Registration are the same. This ensures that everyone in our profession has relatively the same base knowledge when applying the laws and rules set forth by the State of Montana.

I guess what I am saying is that I fully support the requirement to have a license, but I feel the cost to maintaining our license is excessive. Please give consideration to this fact and recommend to the 2017 Montana Legislative Session that base funding be provided to the Montana Board of Sanitarians in order to maintain a more reasonable and economical license fee.

Thank you all for your hard and thankless work!

Sincerely,

Donald E. Saisbury RS

Donald E. Saisbury, R.S.
Kalispell, Montana

Montana Environmental Health Association

April 13, 2016

Montana Environmental Health Association
P.O. Box 741
Helena, MT 59624

Representative Ryan Lynch, Chair
Economic Affairs Interim Committee
Montana Legislative Services Division
P.O. Box 201706
Helena, MT 59620-1706

Re: SB390 – Interim Study of Department of Labor and Industry Fees

Dear Chairman Lynch and Members of the Economic Affairs Interim Committee:

This correspondence is to provide additional comment to the letter written by MEHA on November 6, 2015. MEHA is an organization of public health professionals including Registered Sanitarians, environmental consultants and other environmental health professionals dedicated to protecting public health. Members working in the field of environmental health are responsible for licensure/permitting of Montana's licensed food establishments, water systems, wastewater systems, pools/spas and public accommodations. The organization is also responsible for air quality programs and subdivision review programs.

The group appreciates the work that the committee has put forth during the interim study. The printed report addressing direct costs/indirect costs and history of how Boards function was valuable information.

As you may be aware, Montana law requires Sanitarians to be licensed in the interest of public health and safety. MEHA agrees that this is in the best interest of the public as licensure ensures that educational and ethical standards are upheld. Registered Sanitarians are required to enforce state law and rules, therefore it is important that there is Board oversight for purposes of determining qualifications of applicants and any complaints that may arise.

MEHA understands that the Board of Sanitarians has scrutinized the Board budget in order to determine potential cost savings. It appears that there may not be an avenue for savings, thus fees for licensure continue to increase. Approximately half of Registered Sanitarians in Montana pay their licensure fees out-of-pocket while the other half has their licensure fee paid for by the county in which they are employed. As fees continue to rise, the cost burden to the individual Sanitarian increases.

Due to the small size of the group of Registered Sanitarians in Montana, fees are disproportionally high as compared to other licensure groups (i.e., nurses 22,000+ licenses) who pay $100/2years. Sanitarians are willing to pay a reasonable fee for licensure but at the current rate of increase, fees are becoming a financial hardship.

MEHA encourages the committee to recommend to the 2017 legislature that base funding be made available to the Montana Board of Sanitarians in a fashion which will establish sustainability for the board and reasonable fees for the future.

Thank you for your continued efforts on this topic during the legislative interim study.

Sincerely,

Christine Hughes

Christine Hughes
MEHA Legislative Committee Co-Chair

Tri-County Environmental Health Department

Anaconda/Deer Lodge - Granite - Powell Counties

Anaconda-Deer Lodge County Courthouse
800 Main Street
Anaconda, Montana 59711
Telephone (406) 563-4035
Fax (406) 563-4001

April 13, 2016

Representative Ryan Lynch, Chair
Economic Affairs Interim Committee
Montana Legislative Services Division
PO Box 201706
Helena, MT 59620-1706

Re: SB390- Interim Study of Department of Labor and Industry Fee

Dear Chairman Lynch and Members of the Economic Affairs Interim Committee:

We agree with the comments provided by Susan Brueggeman and MEHA regarding the license fees for Registered Sanitarians.

We would like to stress how important it is to our profession to maintain a professional license for Registered Sanitarians. The board has already taken many cost saving measures, yet the license fees continue to rise. The board must be allowed to do its work without questioning whether there is enough money to meet to review a license application, a rule change or a complaint.

The best way to support boards such as ours, that serve in the interest of public health and safety is to provide financial assistance from public funds. As Susan pointed out, sanitarians are willing to pay a reasonable fee such as Nurses ($100/2 years or Engineers $50/2years).

Thank you for your consideration.

Sincerely,

Chad Lanes, RS, Tri-County Sanitarian
Karen Solberg, RS, Tri-County Assistant Sanitarian K Solberg, R.S.

RiverStone Health

Connecting you to a better life

April 13, 2016

Economic Affairs Interim Committee
Montana Legislative Services Division
P.O. Box 201706
Helena, MT 59620

RE: SB 390 - Interim Study of Department of Labor and Industry Fees

Dear Chairman Lynch and Committee Members:

I am licensed as a Registered Sanitarian in the State of Montana, a credential required by the State of Montana for me to perform my job duties. I am writing to voice my concerns as they relate to your study bill.

1. In the interest of public protection, the Montana Legislature established the requirement that sanitarians must obtain a state license in order to conduct health inspections and other job duties. No monies are allocated from the general fund in support of this public protection. Each individual sanitarian must bear the full cost of the license, despite an annual earning capacity approximating $39,000 to $58,000. Even when the employer bears the cost for the license fee, this shifts funds away from supporting continuing education or providing direct services to the public.

   I am also licensed as a Nutritionist in Montana, under the Board of Medical Examiners. Licensed Nutritionists in Montana are similar in number to Registered Sanitarians and have similar earnings. I pay a fee of $150 every two years for my Nutritionist's License, in contrast to the $270 each year for a Sanitarian's License.

   I urge you to consider decreasing the cost of licensure to the individual sanitarian.

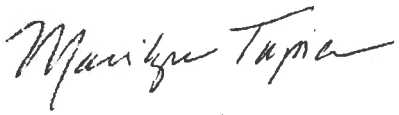
2. The services provided by the Board of Sanitarians add little value to the profession. The burden of documenting that licensure requirements are met fall on the applicant. The applicant must pay a fee with the licensure application; he must order and pay for college transcripts to be delivered directly to the Board and he must pay a fee to take a registration exam which is developed, scored and managed by the National Environmental Health Association, not the Montana Board of Sanitarians. The Board adds no value to this process.

3. The service provided by the Board of Sanitarians do little to protect the public. I am unaware of any audits conducted that assess the integrity and quality of the work of sanitarians in Montana. The Board conducts random audits to verify that continuing education requirements are met, but does not consider their relevance to assigned work.

Liability for sanitarian misconduct would most often fall on the county or state employer, not on the state licensing board.

I urge the committee to consider 1) how administrative and legal costs could be reduced and/or eliminated in order to reduce the overall licensure fee to registered sanitarians and 2) alternative funding to help offset the costs of licensure.

Sincerely,



Marilyn Tapia, REHS/RS
RiverStone Health
123 South 27th St
Billings MT 59101
Marilyn.tap@riverstonehealth.org

April 13, 2016

Representative Ryan Lynch, Chair
Economic Affairs Interim Committee
Montana Legislative Services Division
Helena, Montana 59620-1706

RE: SB390 —Interim Study of Department of Labor and Industry Fees

Dear Chairman Lynch and Members of the Economic Affairs Interim Committee:

I am writing to provide comment in regard to SB390 – Interim Study of Department of Labor and Industry Fees. Please accept the following comments:

CONSIDERATIONS FOR PROVIDING BASE FUNDING FOR THE BOARD OF SANITARIANS:

1. The Montana Legislature has determined it is in the public interest that sanitarians be licensed.

   The Montana Legislature has determined that the sanitarian profession is to be licensed for public health and safety reasons. The legislature has placed the full cost of this professional licensing upon the licensees, with no general fund monies allocated to support this public protection. Just because a profession is small in number does not mean that the legislature's decision to require licensure is less valuable.

   Licensing of sanitarians is in the interest of public health and safety. Registered sanitarians are part of the state's public health system. Licensing of this workforce is certainly in the best interest of public health and safety as a means to provide both an educational and ethical standard. A more complete discussion of this topic was provided to the Montana Department of Labor and Industry (DLI) during board review under the 2013 Legislature's HB 525.

2. The Department of Labor and Industry's method of determining and assigning charges for licensing boards is as fair and equitable as possible but has financial consequences for small boards.

   The Department of Labor and Industry has provided testimony at your December 2015 meeting on why the current method to assign fees charged for board services, both direct and indirect, is the best possible method to fairly and equitably distribute the cost of professional licensing. I believe this is a reasonable effort to assure that fees are commensurate with services. However, as with any system, there are unforeseen and unintended consequences such as the high impact on small boards due to lack of economies of scale.

3. Licensed Sanitarians cannot simply increase business activity or increase charges to cover increases in license fees.

   Licensed Sanitarians work primarily for local government and have modest salaries. Licensing fees are either paid by the individual sanitarian or by their government employers. Unlike many

professions, neither the sanitarian nor his/her employer has the ability to solicit additional business or increase charges for services in order to cover licensing fee increases.

4. The Board of Sanitarians has done everything possible at this time to address its weak financial position and maintain its licensing under current Montana law.

   The Board of Sanitarians, as a very small group of 185* licenses and annual revenues of $43,000, is struggling financially to maintain its professional licensing program. As a means to address its financial situation, the board has completed the following actions as advised by DLI staff:

   a. The Board increased its fees for 2016 from $170/year to $270/year. The Board was advised that this increase, the largest of the fee options presented by DLI staff to the Board, was projected to be adequate for a five-year period and would result in an ample reserve fund to provide for unanticipated expenses such as legal issues.
   b. At its December 2016 meeting, the Board voted to approve a policy as a means to allow DLI staff to process more license applications routinely without the Board meeting for this purpose. The goal of this policy is to both provide faster processing of applications and save the cost of additional Board meetings.

   The Board revised its rules in order to increase licensing fees resulting in higher indirect costs. When the Board revised its rules in order to increase licensing fees, it paid for the direct cost of DLI attorney and staff time to facilitate the rule revision. This is understood and expected. However, such direct costs also increase the Board's percentage of indirect costs during a lookback period. While such increase in indirect costs is inconsequential for large boards, for small boards, such as the Board of Sanitarians, these charges have real negative impact in our financial projections.

5. Rule changes to update professional standards create a financial burden for small boards.

   All boards should be encouraged to periodically update their specific rules as a means to better protect public health and safety. Rule revisions are expensive, however, and are rarely undertaken without serious consideration of cost. Unfortunately, for small boards, not only are the direct costs of rule revisions high, but the resulting percentage of indirect costs adds to the cost burden of rule revision. Boards should have adequate financial support to keep their rules updated without overburdening the licensees.

6. Legislative mandates impact small licensing groups such as the Board of Sanitarians.

   In spite of substantially increasing licensing fees for 2016, the Board of Sanitarians learned at its December 2016 meeting that its financial report was not entirely optimistic. The Board was charged by DLI for expenses unanticipated in our fee increase calculation. These expenses were due to attorney fees necessary to respond to a legislative mandate to update the rules governing DLI professional licensing programs. These were "indirect costs" based upon the overall services the department provided to our board.

   While the actual cost amounts discussed above are inconsequential to many boards, to the Board of Sanitarians, the amounts are substantial expenditures that adversely impact our financial goal of having an annual licensing fee that will bring the board into a positive financial condition that will last five years and provide a reserve.

7. Addressing unprofessional conduct complaints is essential to licensing.

   Such complaints can create serious financial burdens for small boards. A key purpose of licensing is to provide the public a means to address unprofessional practice. For small boards that have critical funding issues, such complaints can be financially crippling as they involved additional administrative and legal fees. While boards assess licensing fees that fund the cost of some complaints, complex cases can create a real hardship for small boards. If the board cannot afford the cost of the complaint, state laws allow for the license holders to be charged additionally beyond the annual licensing fee to cover legal costs.

   It is critical small boards be adequately funded such that they are fully prepared to address complaints from the public regarding its license holders.

8. Combining licensing or licensing without a board is not in the best interest of public health.

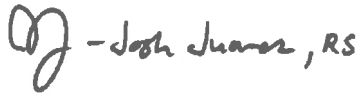
   The Department's report indicates that the economies of scale regarding licensing costs work well for large licensing groups to minimize costs. Taken to its logical conclusion, economies of scale would provide the greatest financial benefit if all 97,000 professional licenses were grouped together, charged one standard licensing fee, and oversighted by one entity.

   However, such mega-structure does not serve the public health and safety of Montana. Specific professional licensing boards are the best means to manage the specific standards of each profession. This is true whether the board has 22,000+ licenses such as the Board of Nursing or whether the board is small such as the Board of Sanitarians with its 185 licenses. Only the individual board has the expertise to address the standards and performance of its licensees in an optimal way. Therefore, the option of combining of boards that are unrelated or licensing administration without a board only to improve a board's finances does not serve the public health and safety of Montana.

In comparison with the licensed professionals we most closely associate with, our fees at $270.00 are very high. Nurses (22,000+ licenses) pay $100/2years; professional engineers and land surveyors (2,000+ licenses) pay $50.00/2 years.

As your committee concludes its work, I urge you to recommend to the 2017 Montana Legislative Session that base funding be made available to the Montana Board of Sanitarians in a formula and amount that will establish and maintain a licensing fee that is more comparable with our professional colleagues.

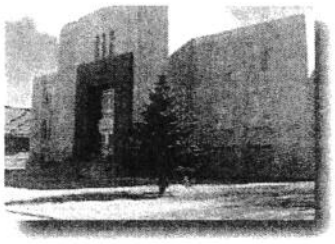
Thank you for your consideration of the above comments and for your work on this interim study.



Josh Juarez, RS
Billings, MT

Board of County Commissioners

Sandra J. Broesder, Chairman
Janice Hoppes, Member
Thomas A. Kuka, Member



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PONDERA COUNTY MONTANA

April 13, 2016

Representative Ryan Lynch, Chair
Economic Affairs Interim Committee
Montana Legislative Services Division
P O Box 201706
Helena MT 59620

Re: SB390 – Interim Study of Department of Labor and Industry Fees

Dear Chairman Lynch and Members of the Committee:

Thank you for your time and efforts on behalf of the Interim Study of the Department of Labor and Industry Fees. We, as commissioners, are grateful that the Department of Labor and Industry has criteria and requirements for the licensing boards. These boards are a valued resource in recruitment and employment of licensed professionals.

Most Registered Sanitarians in Montana work for local governments and do not receive large salaries or compensation. They are not generally able to produce more income by taking on additional clients or charging independently what their time and expertise are worth. They are essential in protecting the environment and public health of all Montanans and are very difficult to recruit in Montana. Fee increases may very well be needed, however, we request you pursue base funding for the license fees from the State's general fund to offset some of the burden on those professionals primarily employed by governments to enforce government policies.

Thank you for your consideration of our request.

Sincerely,

PONDERA COUNTY COMMISSIONERS

Janice Hoppes

By: Janice Hoppes, Member

Missoula Public Health
City-County Health Department

Missoula City-County Health Department
ENVIRONMENTAL HEALTH
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TO: Economic Affairs Interim Committee
FROM: Shannon Therriault, R.S., Environmental Health Manager
DATE: April 13, 2016

I apologize for the lateness of these comments. The Missoula City-County Health Department is concerned about how current accounting and budgeting practices affect licensing fees for small boards like the Board of Sanitarians.

The Board of Sanitarians plays an important role in ensuring a competent and educated environmental public health workforce. Sanitarians work at the intersection of science and public policy, and routinely make measured decisions in the gray area of regulation interpretation. To do this, we have to have the education, knowledge and experience to determine whether public health will be protected in a given circumstance. Our communities, the public and regulated businesses are better served by having a Board confirm that we are qualified to serve in this capacity. (An official from DPHHS once told me that a monkey could fill out a restaurant inspection report, which, while stunningly offensive, may be true if you treat the inspection as a simple checklist of violations. But it takes a person with a good microbiological background to perform risk-based inspections, impart legitimate public health reasons for the rules, apply scientific principles accurately in unique situations, and investigate food borne illness complaints and outbreaks.)

There are only about 185 licensed sanitarians in the state (compared to over 20,000 nurses.) Having such a small pool of licensees makes it difficult to pay all of DLI's direct and indirect costs of operating the board. To save money, the Board of Sanitarians meets infrequently. In recent years, we had difficulty getting new sanitarians-in-training approved in a timely fashion because meetings, even those held over the phone, cost too much money. Emails and phone calls went unanswered.

Last year our fees increased by 50%. DLI staff and Board responsiveness improved significantly. Yet, last year's fee increase apparently did not provide the financial stability that the Board predicted. It seems that the costs attributed to and charged to the Board are not within the Board's control. The current framework does not kindle innovations or improvement, because to meet or change regulations means that license fees have to increase even more.

We don't know what the answer is, but appreciate that the Economic Affairs Interim Committee is looking into this issue. There definitely needs to be some basic support for small boards, especially those that are focused on maintaining public health and safety.

Thank you for the opportunity to comment.

SB 390 Options

Section 1. Interim study of fees assessed -- governmental agencies -- boards. (1) The economic affairs interim committee provided for in 5-5-223 shall conduct a study of fees charged by the department of labor and industry to licensing boards as provided under subsection (2).

(2) The study must include but is not limited to reviewing the following:

(a) fees incurred, calculated, or charged by the department of labor and industry that are:

(i) associated with licensing individuals, including initial licensing, reciprocity, and renewal;

(ii) related to compliance, including inspections and audits; and

(iii) related to any legal or enforcement actions;

(b) costs by the department that are:

(i) direct and indirect costs;

(ii) standardized administrative service costs for license verification, duplicate licenses, late penalty renewals, license lists, and other administrative service costs;

(iii) administrative service costs not related to a specific board or program; and

(iv) legal costs;

(c) whether fees for administrative services are commensurate with the costs of the services provided; and

(d) whether the services provided add value to the work of the boards and contribute to public safety.

- *The Department has said the fees charged are based on direct time spent by personnel for each task and direct costs like those for background checks plus a portion of indirect costs that are based on direct-cost time spent.*

- *Officials have said that the standardized breakdown of costs requested in (2)(a) is difficult because boards vary in number of licensees, requirements that must be verified, and related costs. (2)(a) costs are not standard every year.*
- *The Department has provided past budget breakdowns of direct and indirect costs. Estimates for (2)(b)(i) and (iv)*
- *Administrative costs not related to a specific board are charged based on percent of time spent on direct costs.*

EAIC Goal: 1) Report on cost findings? 2) Draft bills addressing costs? 3) Other related draft bills?

EAIC NEXT STEPS:

?? – More information on costs?

?? – Examination of funding options for boards? Possibly included in this:

1) Revise licensing to allow pro-rated fees for less than a full license term?
2) Allow semi-annual payments (with license dependent on payment)
3) Find alternative sources for paying license fees. For example, allow Boards of Health to include in fee charges for sanitarian jobs a small percentage that could be used to help pay up to one-half (or more) of a sanitarian's licensing fee. Amend 50-2-116, MCA, regarding Boards of Health?)

?? – Addressing 2-15-121 "without approval or control" vs. action supervision

?? – Addressing costs? (See options next page)

COST OPTIONS

1. **Combine** small, related boards into a bigger board with all entities bearing the costs of licensing. This would possibly reduce the number of executive officers needed at the Business Standards Division. Other benefits might be time-saving in budget development. For example, architects and landscape architects, which operate under a combined board, could be configured to have one budget. Time spent on a budget could be parsed out to all members equally.)

   Possible combinations (based on 2013 licensee numbers) and tangentially related fields:
   Alternative Health Care Board (135) + Athletic Trainers (145) + Massage Therapy (1,767) + Optometry (275)
   Occupational Therapy (451) + Physical Therapy (1,364)
   Speech Language Pathologists and Audiologists (649) + Hearing Aid Dispensers (59)
   Sanitarians (191) + Professional Engineers and Professional Land Surveyors (671)
   Electricians (5,054) + Plumbers (1,627)
   Clinical Laboratory Science Practitioners (967) + Radiologic Technologists (1,497) + Respiratory Care Practitioners (580)
   Real Estate Appraisers (788) + Realty Regulators (7,065)

2. Limit board-based complaint-filing to X number a year. Now that the Department of Labor and Industry has statutory authority, at the direction of a board, to handle routine complaints, the board-based complaints that drive up screening costs might be limited to egregious cases in which no other complainant is coming forward or an anonymous complaint is egregious enough for the board to act on its own.

3. Provide Department authority for rulemaking in cases in which each board adopts standardized language (as in the military-equivalency rulemaking.)